No. __-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., THE ADVERTISING FREEDOM COALITION, and THE ADVERTISING CLUB OF NEW YORK, INC.,

Petitioners,

—v.—

RUDOLPH W. GIULIANI, in his official capacity as Mayor of the City of New York, THE CITY OF NEW YORK, GASTON SILVA, in his official capacity as Commissioner of the New York City Department of Buildings, and ALFRED C. CERULLO III, in his official capacity as Commissioner of the New York City Department of Finance,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January 12, 2000

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QUESTION PRESENTED

Whether a New York City law that bans throughout the City virtually all outdoor tobacco product advertising and indoor tobacco product advertising visible from the street is preempted under Section 5(b) of the Federal Cigarette Labeling and Advertising Act as a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes . . . ."

PARTIES BELOW

The parties before this Court are those set forth in the caption, which are the same parties that appeared in the United States Court of Appeals for the Second Circuit.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners The Greater New York Metropolitan Food Council, Inc., the Advertising Freedom Coalition, and the Advertising Club of New York, Inc. inform the Court that they have no parent companies and no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit that a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case, entered on October 25, 1999.

OPINIONS BELOW

The December 16, 1998 memorandum opinion and order of the United States District Court for the Southern District of New York (Batts, J.) is unreported. It is reprinted in the Appendix hereto at 21a-40a. The October 25, 1999 opinion of the Court of Appeals for the Second Circuit is reported at 195 F.3d 100. It is set forth in the Appendix at 1a-20a.

JURISDICTION

Jurisdiction of this Court to review the judgment of the court of appeals entered on October 25, 1999 is invoked under 28 U.S.C. § 1254(1) (1994). This petition is timely filed within 90 days of that decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case requires the Court to determine whether a New York City Ordinance, Article 17-A of subchapter seven of chapter one of Title 27 of the Administrative Code of the City of New York ("Article 17-A"), is preempted by the Federal Cigarette Labeling and Advertising Act (the "FCLAA"), 15 U.S.C. § 1331 *et seq.*

Article 17-A is set forth in the Appendix to this petition at 41a-47a.

Section 5 of the FCLAA provides:

> "(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> "(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

15 U.S.C. § 1334 (1994).

The Supremacy Clause of the United States Constitution, art.VI, cl. 2, provides in relevant part that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

This petition presents the Court with a conflict between rulings of the Second, Fourth, Seventh and Ninth Circuits concerning the application of the preemption provision of the Federal Cigarette Labeling and Advertising Act. In this case, Petitioners challenged, on federal preemption grounds, a New York City law, Article 17-A, which virtually eliminates throughout the City outdoor tobacco product advertising and indoor tobacco product advertising that may be seen from the street. The United States Court of Appeals for the Second Circuit allowed the Ordinance to stand, with the exception of a provision entitling retailers to post a single sign stating "TOBACCO PRODUCTS SOLD HERE," which was held to be preempted. The Second Circuit's holding was consistent

with previous rulings of the Fourth and Seventh Circuits, which upheld similar ordinances against preemption challenges for essentially similar reasons. Less than a month after the Second Circuit held the New York City ordinance not to be preempted, the United States Court of Appeals for the Ninth Circuit held a virtually identical Resolution, imposed in the state of Washington by the Tacoma-Pierce County Health Department Board of Health, to be preempted in its entirety by Section 1334(b) of the FCLAA. Copies of each of the four Court of Appeals rulings are annexed to this petition. (App. 1a-20a, 48a-61a, 62a-74a, and 75a-93a) As a result of these conflicting rulings, the ability to display advertising and promotion of tobacco products on retail premises now varies widely from state to state, and depends entirely on the geographical location of the advertiser.

The Challenged Law

Article 17-A, as enacted in 1998, makes it "unlawful for any person to place, cause to be placed, maintain, or cause to be maintained" any "tobacco product advertisement within one thousand feet in any direction of any school building, playground, child day care center, amusement arcade, or youth center, in any outdoor area . . . ." (App. 44a) It further bans such advertisements inside any building within 1,000 feet of these areas when such advertisements are within five feet of any exterior window or any door used by the public, unless the advertisement is parallel to the street and facing inwards, or affixed to a wall panel or similar structure perpendicular to the street. (App. 45a) The land mass covered by Article 17-A, combined with areas already off-limits to tobacco advertising, accounts for over 94% of the City.

As originally enacted, the ordinance contained an exception to these advertising restrictions which permitted the placement of a single black-and-white text-only "tombstone" sign of a specified size and color outside stores stating "TOBACCO PRODUCTS SOLD HERE" (App. 45a) The

United States Court of Appeals for the Second Circuit held that exception to be preempted, concluding that it was inconsistent with Section 1334(b) of the FCLAA. (App. 12a-15a) The ordinance therefore now prohibits *all* outdoor tobacco product advertising within the vast forbidden zones, on pain of civil penalties and injunctive relief, including mandatory cigarette license revocation for a third violation within an 18-month period.

The Parties and the Basis for the Litigation

Petitioner, the Greater New York Metropolitan Food Council, Inc., is comprised of numerous small businesses involved in the food industry nationwide, including over 500 independent supermarkets and various small retail stores located throughout the five boroughs of New York City. Many of these supermarkets and small shops advertise cigarettes by posting signs in their store windows, on their doors or outside their stores. Petitioners, The Advertising Freedom Coalition and the Advertising Club of New York, Inc., are associations that represent various advertising interests, including manufacturers, retailers, advertising agencies, media organizations, public relations firms and others, many of whom advertise tobacco products through the use of billboards, outdoor signs, and other means. All three petitioners represent constituencies that advertise and wish to continue to advertise tobacco products in areas of New York City that Article 17-A places off limits.

Petitioners brought this § 1983 civil rights action in the United States District Court for the Southern District of New York against Respondents, the City of New York and the City officials responsible for enforcing Article 17-A (hereinafter collectively referred to as "New York" or the "City"). The action sought a declaratory judgment that Article 17-A is preempted by federal law and that it violates both the First Amendment to the United States Constitution and Article I, Section 8 of the New York State Constitution. Petitioners also

sought a permanent injunction against enforcement of Article 17-A. Jurisdiction of the district court existed pursuant to 28 U.S.C. §§ 1331 and 1343.[1]

The District Court Decision

Following discovery, the parties cross-moved for summary judgment. On December 18, 1998, the district court granted Petitioners' motion for summary judgment, denied Respondents' cross-motion for summary judgment, and permanently enjoined the City from enforcing Article 17-A on the ground that it was expressly preempted by Section 1334(b) of the FCLAA. (App. 37a) In light of its preemption ruling, the district court found it unnecessary to reach Petitioners' additional arguments. (App. 40a)

Relying heavily on this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), and the Second Circuit's opinion in *Vango Media, Inc.* v. *City of New York*, 34 F.3d 68 (2d Cir. 1994), the district court noted that both courts had counseled that "the preemptive scope of the . . . [FCLAA] is governed entirely by the express language in § [1334(b)]." (App. 26a) After a careful examination of the language and meaning of that provision, the district court concluded that Article 17-A was preempted in its entirety because it constituted (1) a "requirement or prohibition," (2) "based on smoking and health," (3) "with respect to the advertising or promotion of cigarettes." (App. 27a-37a)

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[1] The 1998 settlement agreement between the major cigarette manufacturers and the states, including New York, does not affect Petitioners' case. While the settlement agreement does include some consented-to advertising restrictions, it continues to permit advertising that Article 17-A would eliminate—specifically, indoor and outdoor advertising displayed on the premises of retail establishments, such as those of members of Petitioner Greater New York Metropolitan Food Council, that sell tobacco products. Furthermore, the agreements apply only to their private signatories.

Respondents raised two main arguments against preemption: (1) that Article 17-A was not "based on smoking and health" because its articulated purpose was to "promote enforcement" of New York laws banning the sale or distribution of tobacco products to minors and was therefore not health-related, and (2) that Article 17-A is not "with respect to the advertising or promotion of any cigarettes" because, like a similar Baltimore ordinance that had survived a preemption challenge in the Fourth Circuit (*see Penn Advertising, Inc.*v. *Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997)) (App. 48a-61a), Article 17-A supposedly restricted only the location of tobacco advertisements, rather than advertising content. The district court rejected both arguments. (App. 28a-37a)

In disposing of Respondents' first argument, the district court relied upon *Gade* v. *National Solid Waste Management Ass'n*, 505 U.S. 88 (1992), for the proposition that courts are not bound by the articulated purpose of an ordinance for preemption purposes, but must consider both its actual purpose and effect. (App. 28a) After examining the legislative history of Article 17-A, the district court concluded Article 17-A was "based on smoking and health" because both the actual purpose and effect of the ordinance was to promote health. (App. 28a-31a)

As to the Respondents' second argument, the so-called "content/location distinction," the district court found "no support for such a distinction, either in the FCLAA itself" or in the relevant case law. (App. 32a) Noting that the actual language of Section 1334(b) does not support any distinction between content and location restrictions, the district court rejected the reasoning of *Penn Advertising* and found the content/location distinction proposed by Respondents inconsistent with both this Court's decision in *Cipollone* and the Second Circuit's decision in *Vango Media*. (App. 32a-37a)

The Decision of the Court of Appeals

The Second Circuit reversed the decision as it applied to the bulk of the ordinance, affirming the district court's decision only insofar as it pertained to Article 17-A's tombstone provision. (App. 19a) The court of appeals recognized that under the plain language of Section 1334(b) all of Article 17-A would fall within the preemptive scope delineated by Congress. (App. 8a-9a) The court did not deny, as the district court had found, that the New York law was a "requirement or prohibition," or that it was "based on smoking and health," or that, on its face, it was "with respect to the advertising or promotion of . . . cigarettes." But the court nevertheless refused to read Section 1334(b) that way, cautioning against an "overly-expansive, literal interpretation" of Section 1334(b) that "could subvert the presumption against preemption." (App. 9a) Instead, it dismissed the express language used by Congress—language that this Court described in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), as "provid[ing] a 'reliable indicium of congressional intent with respect to state authority," *id.* at 517—as "provid[ing] little insight into the preemptive scope intended by Congress." (App. 8a) Rather than give effect to the language of Section 1334(b), the court of appeals found in the policy stated in Section 1331 of the FCLAA—to avoid "diverse, nonuniform and confusing advertising standards"—a basis for concluding that "mere location restrictions" on tobacco advertising do not create the kind of "diverse, nonuniform and confusing" advertising regulations Congress sought to avoid. (App. 10a-18a) Applying the same anti-textual content/location distinction that had been applied by the Fourth Circuit in *Penn Advertising* and by the Seventh Circuit in *Federation of Advertising Industry Representatives, Inc.* ("FAIR") v. *City of Chicago*, 189 F.3d 633 (7th Cir. 1999), in holding similar legislation not to be preempted, the Second Circuit held that the bulk of the ordinance was not preempted because it "merely" restricted the location and not the content of tobacco product advertising. (App. 15a-18a)

Three weeks after the opinion of the court of appeals was entered on October 25, 1999, the Court of Appeals for the Ninth Circuit in *Lindsey* v. *Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999) (App. 75a-93a), held a virtually identical scheme designed to limit tobacco advertising in Tacoma, Washington to be preempted for the very reasons relied upon by the district court in this case and rejected by the Second Circuit. The Ninth Circuit was aware of, and explicitly rejected, the reasoning of the Second Circuit. (App. 86a-89a)

REASONS FOR GRANTING THE WRIT

I

The Second Circuit's Decision In This Case Results In A Circuit Split That Directly Undermines Congress' Intent In Passing The FCLAA

The Second Circuit's opinion in this case directly conflicts with a ruling of the Ninth Circuit in a nearly identical case, *Lindsey* v. *Tacoma-Pierce County Health Department*.[2] (App. 75a-93a) In *Lindsey*, the Ninth Circuit struck down a Resolution of the Tacoma-Pierce County Health Department (the "Resolution"), effectively banning outdoor tobacco adver-

[2] The *Lindsey* court, like the Second Circuit in this case and the Seventh Circuit in *FAIR*, reversed the district court's decision below. *See Lindsey* v. *Tacoma-Pierce County Health Department*, 8 F. Supp. 2d 1213 (W.D. Wash. 1997) (holding that no part of Resolution essentially banning outdoor advertising of cigarettes was preempted by the FCLAA), reversed by *Lindsey*, 195 F.3d 1065 (9th Cir. 1999); *Federation of Advertising Industry Representatives, Inc.* ("*FAIR*") v. *City of Chicago*, 12 F. Supp. 2d 844 (N.D. Ill. 1998) (holding that ordinance restricting outdoor cigarette and alcohol advertising was preempted by FCLAA in its entirety), *reversed by FAIR*, 189 F.3d 633 (7th Cir. 1999). This diversity of opinions on the meaning of Section 1334(b) illustrates the extent of the confusion surrounding this important issue. *See also Rockwood* v. *City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998) (holding ban of outdoor advertising of cigarettes to be preempted).

tising in Pierce County, Washington, on the ground that it was preempted by Section 1334(b). The Resolution in *Lindsey*, like Article 17-A, banned all tobacco advertisements that could be seen from the street unless they were presented in a specified tombstone format. (App. 77a-79a) The Resolution further prohibited the display of the specified tombstone signs if visible from "a school, school bus stop, bus stop, or sidewalk regularly used by minors to get to school or within one thousand feet of a school, playground, or public park." (App. 78a) Unlike the Second, Fourth, and Seventh Circuits, the Ninth Circuit struck down the Resolution in its entirety, concluding that it was preempted by Section 1334(b).[3]

The Board of Health in *Lindsey*, like New York City here, did not contend that the plain language of the FCLAA failed to preempt its ban on outdoor tobacco advertisements. (App. 84a) Rather, the Board, like the City here, tried (in the language of the Ninth Circuit) "to evade the express language of the FCLAA's preemption provision" by "arguing that the FCLAA does not preempt its resolution because the FCLAA only preempts local laws that regulate the content rather than the location of cigarette advertisements." *Id.* The Ninth Circuit, relying on this Court's decision in *Cipollone*, dismissed this argument, explicitly rejecting the decisions of the Second, Fourth and Seventh Circuits and finding instead that the content/location distinction set forth in those cases "ignores the history, purpose, and language of the FCLAA and is not supported by Supreme Court precedent." *Id.*

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[3] On December 28, 1999, the Ninth Circuit ordered the parties to file simultaneous briefs setting forth their respective positions on whether the *Lindsey* case should be reheard *en banc*. In fact, the Tacoma-Pierce Health Department has determined not to appeal the ruling of the Ninth Circuit. *See Seattle Times*, Dec. 5, 1999, at B3. This Court will have the opportunity to resolve the circuit split only by granting review in this case and/or the *FAIR* case from the Seventh Circuit, as to which a petition for a writ of *certiorari* is being filed contemporaneously.

The Ninth Circuit looked first to the plain language of Section 1334(b), concluding that the resolution was "preempted by the clear and express language" as a (1) requirement or prohibition, (2) based on smoking and health, (3) with respect to the advertising or promotion of cigarettes. The Resolution, the court concluded was (1) a local law, (2) pertaining to health matters related to cigarette smoking, that (3) expressly prohibited outdoor tobacco advertisements and regulated point of sale information. (App. 83a-84a)

The *Lindsey* court then examined—and rejected as "not supported by the plurality decision in *Cipollone*" (App. 86a)—the efforts of the Courts of Appeals of the Fourth, Second and Seventh Circuits to exalt what they perceived to be the "purpose" of Section 1334(b) over the plain language of the statute. Noting that both the Second and Seventh Circuits "[r]ecogniz[ed] that the text of the FCLAA preemption provision does not support the artificial distinction between content and location restrictions," the Ninth Circuit criticized the decisions of its sister circuits for erroneously "turn[ing] to the Congressional purpose behind the FCLAA statute for support" for this distinction and for misconstruing that purpose by incorrectly concluding that location restrictions "do not lead to the 'diverse, nonuniform, and confusing' advertising standards that Congress aimed to prevent by promulgating the FCLAA preemption statute." (App. 86a-87a) The court concluded that:

> "The distinction between location and content regulations is not only unsupportable by reference to the text, but the Congressional purpose of § 1334(b) supports the preemption of a ban on outdoor tobacco advertising. . . . [T]he failure to preempt location restrictions on tobacco advertising will place an unjustifiable burden upon a tobacco advertiser to consult local regulations concerning the placement of tobacco advertisements in every locality in which it wishes to advertise. The bans on outdoor advertising in *FAIR*, *Giuliani*, and this case

> present a good example of the multitude of different regulations tobacco advertisers face. . . . [As a result of these separate advertising regulations], a tobacco advertiser is faced with diverse and nonuniform tobacco advertising regulations depending solely upon the politics of the locality of the advertising. This is precisely the result Congress was trying to avoid in promulgating Section 1334(b)."

(App. 87a-88a) (internal citations omitted)

The Ninth Circuit further concluded that the history of Section 1334(b) did not support the content/location distinction of the Second and Seventh Circuits, noting that the distinction was inconsistent with this Court's interpretation of the 1969 amendments in *Cipollone* as broadening the scope of preemption *beyond* state laws that only regulated the "content" of tobacco advertisements. (App. 89a-90a) The court noted that the 1965 preemption provision of the FCLAA provided that, "[n]o *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes," (App. 89a, quoting 15 U.S.C. § 1334(b) (1964 & Supp. I 1965)), and that this provision was amended in 1969 to its present form. Quoting *Cipollone*, the Ninth Circuit pointed out that the language of the current preemption provision is "much broader" than the 1965 version in at least two ways:

> "First, the later Act bars not simply 'statements,' but rather 'requirements or prohibitions imposed under state law.' Second, the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes."

(App. 89a, quoting *Cipollone*, 505 U.S. at 520) *See also Medtronic Inc.* v. *Lohr*, 518 U.S. 470, 489 n.9 (1996) (noting that "the statute in *Cipollone* was clearly intended to have a broader preemptive effect than its 1965 predecessor"). The court held that "[t]o give effect to the 1969 amendments, the

distinction between content regulations and location regulations cannot . . . be sustained because the 1965 statute only preempted content regulations and the 1969 amendments broadened the scope of preemption beyond state laws that regulated only the content of tobacco advertisements." (App. 90a)

Finally, the *Lindsey* court held that the structure of the FCLAA itself, when viewed as a whole, militated against the content/location distinction upheld by the other courts of appeal. Specifically, the court noted that the FCLAA's other preemption provision, which provides that "[n]o statement relating to smoking and health . . . shall be required on any cigarette package," 15 U.S.C. § 1334(a), stands in sharp contrast to Section 1334(b) in that, unlike Section 1334(b), it is directed only at specific "statements" relating to smoking and health. As the Ninth Circuit noted, "[i]n order to distinguish between the language currently used in § 1334(a) from the language currently used in § 1334(b), § 1334(b) must be read as preempting more than just content regulations." (App. 90a) To accept the content/location distinction, the court noted, would be "to give 'requirement or prohibition' in subsection (b) essentially the same meaning as 'statement' in subsection (a), thereby ignoring the basic principle of statutory construction that different words in the same statute must be given different meanings." (App. 90a)

There is thus a direct conflict between the preemption rulings that now govern in the 11 states within the three circuits that have held legislation such as Article 17-A not to be preempted and in the 9 states within the Ninth Circuit that has held such legislation to be preempted. The split amongst the circuits on this important issue should now be resolved.[4]

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[4] The circuit split on the meaning of Section 1334(b) also warrants review by this Court because the very fact of the split undermines the Congressional purpose stated in the FCLAA of preventing "diverse, nonuniform, and confusing" cigarette "advertising regulations," and of protecting "commerce and the national economy" to "the maximum extent consistent with" the policy of informing the public about the health risks of smoking.

II.

The Second Circuit's Decision In This Case Conflicts Directly With This Court's Opinion In *Cipollone*

The Second Circuit's opinion is not only in conflict with the Ninth Circuit's decision in *Lindsey*, but is also in direct conflict with *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), the only case in which this Court has directly addressed the meaning of Section 1334(b). In *Cipollone*, a divided Court held that Section 1334(b) preempted certain common law claims against cigarette manufacturers, but did not preempt other such claims. *Id.* at 520-530.[5] The Second Circuit's approach to interpreting Section 1334(b) ignores those aspects highlighted by this Court in *Cipollone* as most important—specifically, the plain language of the statute and the 1969 amendments broadening its preemptive scope.

A majority of the Court in *Cipollone* concluded that "the preemptive scope of [Section 1334(b)] is governed entirely by the express language of [Section 1334(b)]." *Cipollone*, 505 U.S. at 517 (plurality opinion); id. at 531-32 (Blackmun, J.,

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See 15 U.S.C. § 1331(2) (1994). State and local tobacco advertising regulations, such as those challenged in *Penn Advertising*, *FAIR*, *Lindsey*, and this case, have been passed in cities throughout the country, each setting different restrictions on tobacco products advertising. These regulations impose a significant burden on store owners and other tobacco advertisers, such as Petitioners, who must, on their own, figure out the ever-changing boundaries of each locale's restricted areas by keeping track of the frequent openings and closings of day-care centers, youth centers, amusement arcades, playgrounds, and/or schools, while complying with state and national advertising regulations as well. This is the very "diverse, nonuniform and confusing" result Congress sought to avoid by passing the FCLAA.

[5] The plurality opinion was written by Justice Stevens and joined by Chief Justice Rehnquist and Justices White and O'Connor. Justice Blackmun's opinion, joined by Justices Kennedy and Souter, concluded that none of petitioners' claims were preempted by the FCLAA. Justice Scalia's opinion, joined by Justice Thomas, concluded that all of petitioners' claims were preempted by the FCLAA.

concurring in part and dissenting in part) (agreeing with plurality that express language of Section 1334(b) is determinative). Finding that Section 1334(b) "provide[d] a 'reliable indicium of congressional intent with respect to state authority,' " a majority of the Court also explicitly rejected the lower courts' implied preemption analysis, which the Court faulted for looking beyond the text of the statute. *Id.* at 517 (plurality opinion); *id.* at 531-32 (Blackmun, J., concurring in part and dissenting in part). Finally, and most notably, the *Cipollone* Court unanimously agreed that the plain meaning of Section 1334(b) was of primary importance in interpreting the preemptive scope of the FCLAA. *See* 505 U.S. at 521-22 (" 'We must give effect to this plain language [of Section 1334(b)] unless there is good reason to believe Congress intended the language to have some more restrictive meaning.' In this case there is no 'good reason to believe' that Congress meant less than what it said.") (internal citation omitted); *id.* at 532 ("[A]n interpreting court must 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' ") (Blackmun, J., concurring in part and dissenting in part) (quoting *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990)); *id.* at 544 ("[O]ur job is to interpret Congress's decrees of preemption neither narrowly nor broadly, but in accordance with their apparent meaning.") (Scalia, J., concurring in part and dissenting in part).

As the *Lindsey* court noted, the Second Circuit's opinion simply refuses to take the plain language of Section 1334(b) seriously, as required by *Cipollone*. (App. 86a-89a)[6] The Second Circuit's concerns about the consequences of a "literal" reading of Section 1334(b) stand in stark contrast to this

[6] The same is true of both the Fourth Circuit's decision in *Penn Advertising* and the Seventh Circuit's decision in *FAIR*, both of which upheld similar tobacco advertising ordinances (except for a tombstone provision in the ordinance at issue in *FAIR*) against a preemption challenge on the basis of the content/location distinction. *Penn Advertising*, 63 F.3d at 1324; *FAIR*, 189 F.3d at 639.

Court's repeated assertion that the plain language of Section 1334(b) is controlling. Focusing not only on the "with respect to" language of § 1334(b), but on the entire provision as a whole, this Court made clear in *Medtronic*, 518 U.S. 470, that the text of Section 1334(b) is hardly as unboundedly expansive as the Second Circuit suggests, but is rather "targeted at a limited set of state requirements—those 'based on smoking and health'—and then only at a limited subset of the possible applications of those requirements—those involving the 'advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of' the federal statute." *Id.* at 488. *See also Cipollone*, 505 U.S. at 517, 521-22 (noting the clarity of the language of Section 1334(b)). The refusal of the Second Circuit to give effect to the plain meaning of Section 1334(b) is thus in stark contrast to this Court's jurisprudence.[7]

The Second Circuit's reliance on the legislative history of Section 1334(b) also runs counter to this Court's examination of that legislative history in *Cipollone*. Specifically, the Second Circuit's opinion fails to even acknowledge, let alone appreciate the significance of, the central element of the legislative history of Section 1334(b) identified by this Court in *Cipollone*, namely, that the 1965 version of the statute—

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[7] The Second Circuit sought support for its anti-textual approach not in *Cipollone*, which had said quite the opposite, but in *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 645 (1995), an ERISA preemption case in which this Court, according to the Second Circuit, "cautioned against 'uncritical literalism' when interpreting similarly open-ended language in the express preemption provision of another federal statute [i.e., ERISA]." (App. 9a) This Court has made clear, however, that the language of ERISA (or other "unhelpful" preemption provisions) is simply too different from that of the FCLAA to permit interpretation of the former to dictate that of the latter. *Compare Travelers Insurance Co.*, 514 U.S. at 656 (ERISA text described as "unhelpful") with *Cipollone*, 505 U.S. at 517 (FCLAA text described as clear). *See also Medtronic*, 518 U.S. at 488 (holding out Section 1334(b) as reasonable in scope and contrasting it with 21 U.S.C. § 360k(a), the broad preemption provision at issue in that case).

which was narrow and specifically targeted advertising content—was amended in 1969 to broaden significantly the preemptive scope of the statute. If, as the Second Circuit suggests, Congress was merely concerned with ensuring uniform regulation of cigarette advertising information (*see* App. 11a, 12a, 16a), the adoption in 1969 of a "much broader" preemption provision (as this Court described it in *Cipollone*) would hardly have been necessary. *See* pp. 11-12 above.

Finally, the content/location distinction of the court of appeals runs directly counter to this Court's recognition in *Cipollone* that a ban on advertising in particular media is precisely the kind of "diverse, nonuniform, and confusing" regulation that Congress sought to end when amending Section 1334(b) in 1969. *See Cipollone*, 505 U.S. at 515 n.11 (citing a California state ban on print and electronic cigarette advertisements as the type of diverse, non-uniform and confusing cigarette advertising regulation that prompted the broadening of Section 1334(b) in 1969). Even the Justices in *Cipollone* who viewed the 1969 Amendments to Section 1334(b) as "nonsubstantive in nature" (and who narrowly interpreted Section 1334(b)) acknowledged that, by adding the word "prohibition," Congress sought to "ensure that a State could not do through negative mandate (*e.g.*, *banning all cigarette advertising*) that which it already was forbidden to do through positive mandate (*e.g.*, mandating particular cautionary statements) . . . ." *Cipollone*, 505 U.S. at 539 (Blackmun, J., concurring in part and dissenting in part) (emphasis added). This is precisely what Article 17-A tries to do through its draconian "location" restrictions.

In short, entirely apart from the direct circuit split that this case raises, the Second Circuit's opinion in this case ignores this Court's analysis in *Cipollone* to reach a result that Congress never intended. The case is well worthy of review.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Dated: New York, New York
January 12, 2000

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1999

(Argued: September 7, 1999

Decided: October 25, 1999)

Docket No. 99-7006

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., THE ADVERTISING FREEDOM COALITION and THE ADVERTISING CLUB OF NEW YORK, INC.,

Plaintiffs-Appellees,

—v.—

RUDOLPH W. GIULIANI, in his official capacity as Mayor of the City of New York, THE CITY OF NEW YORK, GASTON SILVA, in his official capacity as Commissioner of the New York City Department of Buildings and ALFRED C. CERULLO, III, in his official capacity as Commissioner of the New York City Department of Finance,

Defendants-Appellants.

Before:

MCLAUGHLIN, CALABRESI, SOTOMAYOR,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Batts, *J.*), enjoining the enforcement of a New York City ordinance, the "Youth Protection against Tobacco Advertising and Promotion Act," and declaring the ordinance preempted under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.*, and the Supremacy Clause of the United States Constitution.

AFFIRMED in part, REVERSED in part, and REMANDED.

FLOYD ABRAMS, Cahill Gordon & Reindel, New York, NY (Jonathan Donnellan, Joel Kurtzberg, Matthew A. Leish, Cahill Gordon & Reindel, Howard B. Tisch, Greater New York Metropolitan Food Council, Inc., on the brief), *for Plaintiffs-Appellees.*

ELIZABETH S. NATRELLA, Corporation Counsel's Office, City of New York, New York, NY (Michael D. Hess, Corporation Counsel, Leonard J. Koerner, and Deborah Rand, on the brief), *for Defendants-Appellants.*

DOUGLAS N. LETTER, United States Department of Justice, Washington, DC, submitted a brief and argued *for amicus curiae*, United States of America.

ELIOT D. PRESCOTT and JANE R. ROSENBERG, Assistant Attorneys General, Attorney General's Office, State of Con-

necticut, Hartford, CT, submitted a brief *for amicus curiae*, State of Connecticut.

DONALD W. GARNER, Pepperdine University Law School, Malibu, CA, submitted a brief *for amici curiae*, American Medical Association, American Heart Association, American Lung Association, American Cancer Society, Center for Science in the Public Interest, Public Citizen, Inc., Medical Society of the State of New York, Protect Our Youth, New York Public Interest Research Group, Project Friend, League of Women Voters of New York State, Campaign for Tobacco-Free Kids, The Diocese of Brooklyn Drug Prevention Program, Smokefree Educational Services, Inc., New York State Occupational Therapy Association, Coalition for Smokefree Harlem, The Heart of Harlem Cardiovascular Disease Prevention Program, Boriken Neighborhood Health Center, Bushwick Community Service Society, New York County Medical Society, Unidos Coalition, New Jersey Gasp, Alliance for Smoke-Free Air, Montefiore Medical Center/Albert Einstein Cancer Center.

ARTHUR N. EISENBERG, New York Civil Liberties Union, New York, NY submitted a brief *for amicus curiae*, New York Civil Liberties Union.

RICHARD A. SAMP and DANIEL J. POPEO, Washington Legal Foundation, Washington, DC submitted a brief *for amicus curiae*, Washington Legal Foundation.

MCLAUGHLIN, *Circuit Judge*:

BACKGROUND

This appeal stirs up a volatile mix of anti-tobacco legislation, federal preemption and First Amendment limitations upon commercial speech.

In early 1998, New York City enacted Local Law No. 3. It is entitled the "Youth Protection Against Tobacco Advertising and Promotion Act," and is codified as Article 17-A to Title 27, Chapter 1, subchapter 7, of the New York City Administrative Code §§ 27-508.1 to 27-508.6 ("Article 17-A"). Article 17-A prohibits most outdoor advertising of tobacco products (other than tobacco advertisements on motor vehicles) within one thousand feet of any school building, playground, child day care center, amusement arcade or youth center. It also prohibits most indoor advertising in the same areas if the advertisements can be seen from the street. There is one exception to the ban: a single, black-and-white, text-only "tombstone" sign stating, "TOBACCO PRODUCTS SOLD HERE," may be placed within ten feet of an entrance to a store where tobacco products are sold.

Section 1 of Local Law 3 contains a "Declaration of legislative findings and intent." According to the Declaration, Article 17-A's purpose is "to strengthen compliance with and enforcement of laws prohibiting the

sale or distribution of tobacco products to children and to protect children against such illegal sales."

Article 17-A also contains a severability clause, stating that if any portion of the ordinance should be found invalid, this will not affect the remaining portions.

On the day that Mayor Giuliani signed Article 17-A into law, the plaintiffs, various supermarket and advertising associations (collectively, the "Advertisers") brought this § 1983 action against New York City, Mayor Giuliani, and two other city officials responsible for enforcing Article 17-A (collectively, the "City") in the United States District Court for the Southern District of New York (Batts, *J.*). The Amended Complaint seeks declaratory and injunctive relief. It alleges that: (1) Article 17-A is preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331, *et seq.* (1994), and therefore violates the Supremacy Clause of the United States Constitution; and (2) Article 17-A unconstitutionally restricts commercial speech in violation of the First Amendment. After some discovery, all parties moved for summary judgment.

Relying heavily on *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994), the district court found that Article 17-A was preempted by the FCLAA's preemption provision: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b).

Noting that § 1334(b) applies to laws of political subdivisions, as well as states, *see id.* § 1332(3), the district court found that the express language of the preemption

provision embraced Article 17-A. The court rejected the City's argument that it should look to congressional intent to determine the preemptive scope of the provision. The district court found no need to examine congressional intent "in light of the fact that both the Supreme Court and the Second Circuit have directed that reliance on the express preemption provision is appropriate." Accordingly, the court awarded the Advertisers summary judgment and permanently enjoined the enforcement of Article 17-A. The district court did not reach the Advertisers' First Amendment claim.

The City now appeals. Several *amici curiae* have weighed in on both sides of the dispute.

DISCUSSION

We review a district court's award of summary judgment *de novo*, drawing all inferences and resolving all ambiguities in favor of the nonmoving party. *See Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997). Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

I. *Preemption*

We are asked to determine whether and to what extent Article 17-A is preempted by the FCLAA. The district court concluded that the FCLAA preempted Article 17-A in its entirety. We conclude, however, that the FCLAA only partially preempts Article 17-A. While the ordinance's "tombstone" provision is preempted, the restric-

tions on advertising within a thousand feet of a school or playground, etc., may stand.

A. *Preemption Principles*

The Constitution directs that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Under the doctrine of preemption, a corollary to the Supremacy Clause, any state or municipal law that is inconsistent with federal law is without effect. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). Federal law may preempt state and municipal law expressly or impliedly. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-204 (1983). Where, as here, a statute expressly preempts state law, our task is to "identify the domain expressly pre-empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

As the Supreme Court has recently emphasized, we must read express preemption provisions in light of two well settled principles. *First*, our interpretation of the provision is guided by the principle that "the purpose of Congress is the ultimate touchstone in every pre-emption case," *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (citation and internal quotations and alteration omitted); and we discern congressional intent not only from the language of the preemption statute, but also from the statutory framework surrounding the provision, the "structure and purpose of the statute as a whole," and our "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 486 (internal quotations omitted). *Second*,

because of federalism concerns, we must interpret Congress's intent strictly, beginning with the presumption that Congress did not intend to displace state law. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Accordingly, we will not find preemption "unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

B. *The Preemptive Scope of the FCLAA*

We start with the FCLAA's preemption language: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). Unhappily, this text provides little insight into the preemptive scope intended by Congress. The ambiguity resides primarily in the open-ended language extending preemption to obligations "with respect to" advertising and promotion of cigarettes. Read literally, these words could be misunderstood to preempt every conceivable obligation having a relationship—however evanescent—to the advertising and promotion of cigarettes. But this hyper-literal approach would yield results that Congress surely did not intend. To take an absurd example, it could divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there. Or to borrow another example mentioned by our sister circuit, it could lead to the conclusion that "states [are] without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard." *Federation*

of Advertising Indus. Representatives, Inc. v. City of Chicago, Nos. 98-3191, 99-1115 & 99-1516, ___ F.3d ___, ___, 1999 WL 682015 at *4 (7th Cir. Sept. 1, 1999).

We decline to read § 1334(b) so crudely. As Judge Learned Hand has cautioned, "[t]here is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure." *Central Hanover Bank & Trust Co. v. Commissioner*, 159 F.2d 167, 169 (2d Cir. 1947). And this is especially true in the preemption context, where "the purpose of Congress is the ultimate touchstone," and an overly-expansive, literal interpretation could subvert the presumption against preemption. The Supreme Court recently cautioned against "uncritical literalism" when interpreting similarly open-ended language in the express preemption provision of another federal statute. *Travelers Ins.*, 514 U.S. at 656 (interpreting the Employee Retirement Income Security Act's preemption provision, which extended to state laws that "relate to" any employee benefit plan). And while our analysis of § 1334(b) must perforce begin with its text, "our interpretation of that language does not occur in a contextual vacuum." *Medtronic*, 518 U.S. at 485.

Relying on our decision in *Vango Media*, the district court refused to look beyond the language of § 1334(b) or even to consider congressional intent. *Vango Media*, however, should not be read to "make a fortress out of the dictionary." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (Learned Hand, *J.*), *aff'd*, 326 U.S. 404 (1945). It is not without significance that, while our analysis of § 1334(b)'s preemptive scope in *Vango Media* began

with the language of the provision, *see Vango Media*, 34 F.3d at 72-74, we also went further to consider the stated purpose of the federal act, its historical context, and its legislative history. *See id.* at 74-75. And while we noted that § 1334(b)'s "with respect to" language connotes a potentially expansive preemptive scope, *see id.* at 73-74, we gave effect to that language only because we found that doing so would implement congressional intent. *See id.* at 74. Thus, our "touchstone" remained the legislative purpose underlying § 1334(b), as discerned not only from the language of that provision, but also from other indicia of congressional intent. We adhere to that approach.

Felicitously, Congress has provided valuable insight into the intended scope of preemption under the FCLAA:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

Two conclusions emerge when this statement is read in conjunction with the FCLAA's other provisions. *First*, Congress sought to inform the public about the health dangers of smoking by regulating advertising and labeling information. *See id.* § 1333 (detailing content and format requirements for health warnings on cigarette packages, advertisements, and billboards). *Second*, recognizing the potential burdens on the national economy that might result from the proliferation of "diverse, nonuniform, and confusing" advertising standards, Congress reserved to itself the power to regulate cigarette advertising information. *See id.* § 1334(b) (prohibiting regulations "with respect to" cigarette advertising). As the legislative history confirms, preemption was needed "to avoid the chaos created by a multiplicity of conflicting regulations." S. Rep. No. 91-566 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663.

We must therefore read § 1334(b) in light of: (1) Congress's "comprehensive Federal program" to control cigarette advertising information; and (2) its concomitant concern with avoiding "diverse, nonuniform, and confusing" advertising standards. 15 U.S.C. § 1331. This is the same approach we took in *Vango Media*. There, we held that a New York City ordinance requiring advertisers to display one anti-smoking public health message for every four tobacco advertisements displayed on New York City taxi cabs was preempted under § 1334(b). *See Vango Media*, 34 F.3d at 70. By requiring advertisers to display certain messages about smoking and health (other than those required by the FCLAA), the ordinance risked creating nonuniformity with Congress's federally mandated warning scheme. Accordingly, we found that the ordinance imposed a requirement "with respect to advertising" within the meaning of § 1334(b). It

obstructed Congress' federal scheme to regulate advertising information and risked creating the sort of "diverse, nonuniform, and confusing" standards that Congress wanted to avoid. *Id.* at 74. Noting the laudable goal of informing the public, through advertising, about the health dangers of smoking, we nevertheless held that the means chosen violated the preemption provision which Congress had enacted "in an effort to avoid the chaos of multiple diverse regulations." *Id.* at 70.

This approach tracks the Supreme Court's interpretation of § 1334(b) in *Cipollone*. Although the Court could not garner a majority to agree on how § 1334(b) should be applied in that case itself, a majority of the justices did focus their respective analyses on Congress's stated intent to avoid "diverse, nonuniform, and confusing" advertising standards. *See Cipollone*, 505 U.S. at 529 (plurality opinion) (explaining that while failure to warn claims (which were preempted) involve " 'diverse, nonuniform, and confusing' standards," intentional fraud claims (which were not preempted) do not); *see id.* at 541 (Blackmun, *J.*, concurring in part and dissenting in part) (criticizing the plurality for failing to follow consistently Congress's stated purpose of avoiding "diverse, nonuniform, and confusing regulations").

With this understanding of congressional purpose as our "touchstone," we next turn to Article 17-A, bearing in mind, of course, the presumption against preemption. *See Cipollone*, 505 U.S. at 518.

C. *Article 17-A: The Tombstone Provision*

One provision of Article 17-A clearly presents problems similar to the ordinance in *Vango Media*. Specifically, the tombstone provision limits advertising

information in the restricted areas to black-and-white signs stating "TOBACCO PRODUCTS SOLD HERE;" colors, nontextual images, and non-conforming messages are prohibited. Like the ordinance in *Vango Media*, the tombstone provision thus creates obligations directly pertaining to the nature and content of advertising information. This risks the sort of "diverse, nonuniform, and confusing" advertising standards that Congress expressly sought to avoid. Congress could not have intended to let municipalities promulgate their own unique regulations governing the content and format of cigarette advertising information. *See Phillip Morris Inc. v. Harshbarger*, 122 F.3d 58, 76 (1st Cir. 1997) (noting that "a quintessential state requirement 'with respect to advertising and promotion' would be a law mandating changes or additions to the content of cigarette advertisements") (alteration omitted). Accordingly, we conclude that Article 17-A's tombstone provision is a regulation "with respect to" advertising within the meaning of § 1334(b).

The City nevertheless contends that the tombstone provision is not preempted by § 1334(b). The City makes two arguments. Neither is persuasive.

First, the City asserts that the tombstone provision is not a "requirement or prohibition" within the meaning of § 1334(b) because it is permissive, rather than mandatory. We disagree. Although the tombstone provision is "permissive" in the literal sense that an advertiser is not "required" to post a tombstone sign at all, this does not meaningfully distinguish it from the "requirement" we found preempted in *Vango Media*. That ordinance was similarly "permissive" in that it did not require advertisers to display ads. But if they chose to do so, they had to comply with certain conditions, namely, the posting of a certain number of anti-smoking public health mes-

sages. It is clear that this sort of "permissiveness"—vaguely reminiscent of Hobson's choice—is not dispositive. We find that the tombstone provision imposes a "requirement or prohibition" within the meaning of § 1334(b); it is a "positive enactment" of a political subdivision that "imposes conditions on [the] display of cigarette advertisements." *Vango Media*, 34 F.3d at 72, 75.

Second, the City makes the startling contention that the tombstone provision—and indeed, the entirety of Article 17-A—is not "based on smoking and health" within the meaning of § 1334(b), but is instead aimed solely at promoting law enforcement. For support, the City points to the "Declaration of legislative findings and intent," which announces that the purpose of the ordinance is: "to strengthen compliance with and enforcement of laws prohibiting the sale or distribution of tobacco products to children and to protect children against such illegal sales." We are unpersuaded by this sophistry.

We do not blindly accept the articulated purpose of an ordinance for preemption purposes. *See Vango Media*, 34 F.3d at 73. If that were the rule, legislatures could "nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." *Gade v. National Solid Wastes Management Assoc.*, 505 U.S. 88, 106 (1992) (quoting *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971)). That the City Council drafted a declaration of intent that recites a law enforcement goal while scrupulously avoiding any mention of the word "health" simply cannot control our preemption analysis. Instead, we

follow *Vango Media* and consider both the *purpose* of the ordinance as a whole, and the ordinance's actual *effect*, to determine whether it is "based on smoking and health." *See Vango Media*, 34 F.3d at 73 (citing *Gade*, 505 U.S. 88).

The *Vango Media* analysis makes clear that Article 17-A is indeed "based on smoking and health." We agree with the district court that the legislative history of the ordinance is "replete" with references to the twin purposes of promoting "health" and combating the dangers of smoking.[1] Moreover, the effect of Article 17-A is clearly to promote health because the underage tobacco sales prohibitions whose enforcement it explicitly seeks to promote are inherently based on health concerns.

We find that Article 17-A's tombstone provision is a "requirement . . . based on smoking and health . . . with respect to advertising or promotion of cigarettes." Accordingly, it is preempted under § 1334(b). We therefore affirm that part of the district court's judgment holding that this portion of Article 17-A was preempted.

D. *Article 17-A: The 1000-Foot Verboten Zone*

We reach a different conclusion as to the remaining provisions of Article 17-A, which essentially regulate

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[1] The Health Committee of the City Council convened on several occasions to consider health-related concerns. The first speaker at the first such meeting, for instance, endorsed the ordinance specifically because "children's lives are at risk." Speaker Peter Vallone, the primary sponsor of the law, himself detailed the health risks of smoking and later urged that "the health and safety of our kids just can't wait." Another City Council member was just as emphatic that "it is a health issue, period." We note also that the law itself provides extensive discussion of the disturbing rise in teen smoking, attributed in part to a proliferation of ads portraying smoking as "safe and healthful."

the physical placement of advertising. As to these provisions, we join the only two federal courts of appeals that have addressed § 1334(b)'s effect on similar laws and hold that they are not preempted. *See Federation of Advertising Indus. Representatives, Inc. v. City of Chicago*, Nos. 98-3191, 99-1115 & 99-1516, ___ F.3d ___, ___, 1999 WL 682015 (7th Cir. Sept. 1, 1999); *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 1030 (1996), *readopted as modified on remand*, 101 F.3d 332 (4th Cir. 1996)). Specifically, we find that these location restrictions do not impose obligations "with respect to" advertising as that phrase is used in § 1334(b).

Article 17-A's location restrictions do not implicate the same concerns as the ordinance's tombstone provision or the ordinance in *Vango Media*. The location restrictions do not touch upon Congress's "comprehensive Federal program" to control cigarette advertising information. The restrictions do not, for example, burden advertisers with a duty to warn. Nor do they impose content and format requirements on advertising information.

Instead, those provisions restrict only the physical placement of tobacco advertising signs in a manner akin to a run of the mill zoning regulation. To be sure, Article 17-A's restrictions are unusual in that they ban only signs advertising tobacco, and not other products.[2] However, this disparity does not interfere with the congressional purpose underlying the FCLAA. We do not see—and the Advertisers do not explain—how mere

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[2] We express no opinion whether this targeting of tobacco advertising runs afoul of the First Amendment. *See infra* at Section II. In this discussion, we conclude only that New York City's regulation of ad placement is not preempted under the FCLAA.

location restrictions can lead to the sort of "diverse, nonuniform, and confusing" advertising standards that Congress sought to avoid when it enacted § 1334(b). *See Plumbing Indus. Bd., Plumbing Local Union No. 1 v. E.W. Howell Co.*, 126 F.3d 61, 67 (2d Cir. 1997) (discussing ERISA's preemption provision and stating that "a party challenging a statute must convince a court that there is something in the practical operation" of the statute to show that it is the type of law that Congress wanted to preempt). Divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them. Thus, with or without Article 17-A, a cigarette advertiser will still have to ascertain where it can permissibly advertise in light of diverse local zoning ordinances. And no party suggests that such *zoning* regulations fall within the intended purview of § 1334(b). We see no reason to treat the location restrictions before us any differently.

We also note that the presumption against preemption is particularly strong here, as these provisions are the sort thought to lie within the heartland of the states' historic police powers. *See Medtronic*, 518 U.S. at 485. Zoning regulations on the placement of outdoor advertisements have long been held to lie peculiarly within the states' historic police powers. *See Packer Corp. v. Utah*, 285 U.S. 105, 111 (1932) (upholding a Utah statute banning outdoor advertisements of cigarettes and describing it as a "wholly intrastate" prohibition); *see also Federation of Advertising*, ___ F.3d ___, ___, 1999 WL 682015 at *5 (citing cases). So too, regulations directed at the safety and welfare of children "lie[ ] at the heart of the states' police powers." *Toy Mfrs. of America, Inc. v. Blumenthal*, 986 F.2d 615, 620 (2d Cir.

1992). Article 17-A's location restrictions embody both of these intensely local areas of regulation. Although Congress can choose to preempt such state police power regulations if its intent to do so is "clear and manifest," *Vango Media*, 34 F.3d at 72 (quoting *Cipollone*, 505 U.S. at 516) (internal quotations omitted), we find no such clear intent here. To the contrary, the legislative history of § 1334(b) suggests that Congress wanted to give such regulations a wide berth. *See* S. Rep. No. 91-566, *reprinted in* 1970 U.S.C.C.A.N. at 2663 (noting that § 1334(b) is "narrowly phrased" and "would in no way affect [local power] with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, *or similar police regulations*" (emphasis added)).

E. *Severability*

In light of our determination that only the tombstone provision is preempted by the FCLAA, we must determine whether that provision is severable from the remaining portions of the ordinance. Severability questions are governed by state law. *See Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 60 (2d Cir. 1988). In New York, the test for severability is "whether the Legislature 'would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.' " *See In re New York State Superfund Coalition, Inc. v. New York State Dep't of Envtl. Conservation*, 75 N.Y.2d 88, 94, 550 N.E.2d 155, 157, 550 N.Y.S.2d 879, 881 (N.Y. 1989) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60, 129 N.E. 202, 207 (N.Y. 1920)).

We find that the tombstone provision is indeed severable from the rest of Article 17-A. That the City

Council would have wished the bulk of Article 17-A to be upheld despite the invalidity of the tombstone provision seems beyond doubt. Severance of the tombstone provision would not, in our view, significantly interfere with the central thrust of Article 17-A—to limit cigarette advertising in areas where young people are likely to congregate. This conclusion is reinforced by the City Council's inclusion of an express severability clause indicating its general desire to salvage any valid portions of the ordinance in the event that another portion is adjudged invalid. *See National Adver. Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (New York law) (noting that "[t]he preference for severance is particularly strong when the law contains a severability clause").

We conclude, therefore, that while the tombstone provision of Article 17-A is preempted by § 1334(b), the remaining provisions of the ordinance are valid and enforceable.

II. *First Amendment*

The parties urge us to decide whether Article 17-A unduly restricts commercial speech in violation of the First Amendment. However, because the district court granted summary judgment to the Advertisers on preemption grounds alone, it did not pass upon the merits of the First Amendment claim. In our view, the district court should have the opportunity to consider this issue in the first instance. *See Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1110 (2d Cir. 1992). We remand so that it may do so.

CONCLUSION

We have considered the parties' remaining contentions and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court insofar as it held that the tombstone provision of Article 17-A is pre-empted under the FCLAA, REVERSE insofar as it held that the remaining provisions of Article 17-A are pre-empted, and REMAND for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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98 Civ. 251 (DAB)

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC.; THE ADVERTISING FREEDOM COALITION; and THE ADVERTISING CLUB OF NEW YORK, INC.;

Plaintiffs,

—against—

RUDOLPH W GUILIANI, in his official capacity an Mayor of the City of New York; THE CITY OF NEW YORK; GASTON SILVA, in his official capacity as Commissioner of the New York City Department of Buildings; and ALFRED C. CERULLO, III, in his official capacity as Commissioner of the New York City Department of Finance;

Defendants.

MEMORANDUM & ORDER

APPEARANCES:

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DEBORAH A. BATTS, *United States District Judge*.

Plaintiffs the Greater Metropolitan Food Council, Inc., the Advertising Freedom Coalition, and the Advertising Club of New York, Inc. (collectively "Plaintiffs"), challenge the validity and constitutionality of a local law restricting tobacco advertising in the vicinity of schools, playgrounds, and other promises where children congregate. Defendants Mayor Guiliani, the City of New York, Commissioner Silva and Commissioner Cerullo, would be responsible for the local law's enforcement.

Both parties have cross-moved for summary judgment. For the reasons stated below, the Court hereby GRANTS summary judgment to Plaintiffs in part, and DENIES Defendants' cross motion for summary judgment in part.

I. BACKGROUND

On January 14, 1998, Defendant Mayor Guiliani signed into law the "Youth Protection against Tobacco Advertising and Promotion Act" (the "Act"). (Jt. 56.1 St. ¶ 10.) The Act was part of Local Law 3 of 1998, and was codified as Article 17-A to Title 27, Chapter 1, subchapter 7, of the New York City Administrative Code ("Article 17-A). (*See* Jt. Stip. Docs. Ex. 1; New York City Admin. Code §§ 27-508.1 - 508.6, §§ 26-126.1, 26-126.2, 26-126.4, and 20-760.) Article 17-A prohibits outdoor advertisements for tobacco products within one thousand feet in any direction of a school building, playground, child day care center, amusement arcade or youth

center. (*See* Jt. Stip. Docs. Ex. 1, at 8, Section 27-508.3.) Further, Article 17-A prohibits advertisements for tobacco products inside buildings within the same one thousand foot zone, unless they are placed in such a way that they are either parallel to the street and facing inward, or affixed to a wall perpendicular to the street. (*Id.*) The Act does, however, allow one so-called "tombstone" sign to be placed within ten feet of the entrance to any premises within the proscribed zone that states "TOBACCO PRODUCTS SOLD HERE:" the sign may not be larger than six square feet, and may contain only black text that is no larger than eight inches in height. (*Id.*) A violation of Article 17-A can result in civil penalties, and repeated violations can lead to the revocation of retail store licenses to sell tobacco. (Jt. 56.1 St. ¶ 12.)

A number of public hearings were held by the City Council on the proposed law before it was signed. (*Id.* ¶¶ 16-22.) Indeed, among the Health Committee, the Youth Services Committee and the Mayor, it appears that at least six public hearings were held between June, 1997 and January, 1998, on this topic. (*Id.*)

In the section of Local Law 3 entitled "Declaration of legislative findings and intent," the stated purpose of the legislation is "to strengthen compliance with and enforcement of laws prohibiting the sale or distribution of tobacco products to children and to protect children against such illegal sales." (*See* Jt. Stip. Docs., Ex. 1, at 3.) Article 17-A refers to several local and state laws prohibiting the sale of tobacco products to minors: namely, Section 17-620 of the New York City Administrative Code, Section 139-cc of the New York State Public Health Law, and Section 260.21(3) of the New York State Penal Law. (*See* Jt. 56.1 St. ¶ 24.) Section 17-260 forbids the sale of tobacco products to minors, requires the posting of a sign to that effect where tobacco products are sold, and the showing of identification by buyers unless they reasonably appear to be at least twenty-five years of age. (*Id.* ¶ 26.) The New York City Department of Health and the New York City Department of Consumer Affairs are responsible

for the enforcement of Section 17-260. (*Id.* ¶ 27.) The Department of Health has issued a total of seven violations over the past five calendar years, all for the failure to post the correct sign, and the Department of Consumer Affairs has issued a total of 1,521 violations over the past five calendar years with a sharp variance in frequency from a high of 785 in 1993, to a low of 90 in 1997. (*Id.* ¶¶ 27-30.)

Section 1399-cc of the New York State Public Health Law is essentially identical to Section 17-260. (*Id.* ¶ 32.) It is undisputed that this law in not enforced, and no summonses for violations have been issued over the past five years. (*Id.* ¶ 33.) Finally, Section 260.21(3) of the New York State Penal Law states that selling tobacco in any form to a child under eighteen years of age constitutes the crime of unlawfully dealing with a child in the second degree. (*Id.* ¶ 34.) A total of three arrests were made under this law in the last five years, all in 1996, but no convictions have been recorded for that period. (*Id.* ¶¶ 35-37.)

On the same day the Act was signed into law, Plaintiffs filed suit in this Court.[1] Plaintiffs allege that Article 17-A places an unconstitutional restriction on commercial speech, thereby violating the First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and Article I, Section 8 of the New York Constitution. (Compl. ¶¶ 30-36.) Further, Plaintiffs assert that the Act is preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1334(b). (*Id.* ¶¶ 37-40.)

After some discovery, both parties moved for summary judgment. Defendants agreed by stipulation not to enforce the Act before November 10, 1998. (Jt. 56.1 St. ¶ 15.) On November 9, 1998, the Court granted Plaintiffs' request to enjoin the enforcement of Article 17-A until a decision had been

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[1] Plaintiffs constitute a trade association of businesses in the food industry, a group of national associations of advertisers, and a New York professional association with members from the advertising field. (*See* 56.1 St. ¶¶ 1-4).

rendered on the pending motions. The Court has been assisted in its consideration of the pending motion and cross-motion by the submission of several briefs by amici curiae.[2]

II. DISCUSSION

Heeding the longstanding reluctance of federal courts to avoid unnecessary adjudication of constitutional issues, *see United States v. National Treasury Employees Union*, 513 U.S. 454, 478 (1995) (citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring)), this Court turns first to the question of whether Article 17-A is preempted by federal statutory law.

Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art VI, cl. 2.. Under the doctrine of preemption, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, 138 (1988) (internal citations omitted). The inquiry into preemption " 'starts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' " *Cipollone v. Liggett Group*, 505 U.S. 504, 515 (1992) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "Accordingly, '[t]he purpose of

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[2] In support of Plaintiffs' position, amici curiae briefs were submitted by the Washington Legal Foundation, and the New York Civil Liberties Union.

In support of Defendants' position, an amicus brief was submitted by the American Cancer Society, New York City Division, Inc., Public Citizen, Inc., American Lung Association of New York State, Inc., American Heart Association of New York, Protect our Youth, National Association of Elementary School Principals, National Association of Secondary School Principals, New York Public Interest Research Group, Project Friend, League of Women Voters of New York State, Campaign for Tobacco-Free Kids, the Diocese of Brooklyn Drug Prevention Program, Smokefree Educational Services, Inc., and Medical Society of the State of New York.

Congress is the ultimate touchstone' of preemption analysis." *Id.* (citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

The preemption provision of FCLAA, found in Section 1334(b), states in relevant part:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes . . .

15 U.S.C. 1334(b). Fortunately for this Court, analysis of the preemptive scope of Section 1334(b) does not begin on a blank slate. In *Vango Media v. City of New York*, 34 F.3d 68 (2d Cir. 1994), the Second Circuit decided that a local law requiring the display of one public health message for every four tobacco advertisements displayed on certain property licensed by the City of New York, was preempted by Section 1334(b) of FCLAA. 34 F.3d at 75. The decision in *Vango Media* was expressly guided by the Supreme Court's analysis of the scope of Section 1334(b) in *Cipollone*, where despite a "splintered decision that produced three separate opinions . . . a majority nonetheless agreed upon certain core principles pertinent to the disposition of the case at hand." 34 F.3d at 72. These "core principles" to the preemption inquiry were set forth an follows:

> Most importantly, seven members of the Court concluded that 'the pre-emptive scope of the . . . Act is governed entirely by the express language in § [1334(b)] because Congress 'considered the issue of pre-emption and [ ] included in the enacted legislation a provision explicitly addressing that issue, and . . . that provision provides a 'reliable indicium of congressional intent with respect to state authority.' " *Cipollone*, 505 U.S. at ___ 112 S.Ct. at 2618 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505, 98 S.Ct. 1185, 1190, 55 L. Ed. 2d 443 (1978)). They also opined that " 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation" because

> "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.* (quoting *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282, 107 S.Ct. 683, 690, 93 L.Ed. 2d 613 (1987)).

Vango Media, 34 F.3d at 72. In light of this clear guidance, the task at hand is to determine whether Article 17-A is within the domain expressly preempted by Section 1334(b). In other words, the Court must determine whether Article 17-A constitutes 1) a "requirement or prohibition" 2) "based on smoking and health" 3) "with respect to the advertising or promotion of any cigarettes." *See Vango Media*, 34 F.3d at 72 (looking at the "three essential phrases" of Section 1334(b) and the relationship of each with the local ordinance in question).

A. Requirement or Prohibition

The first phrase of § 1334(b) refers to a "requirement or prohibition." As stated in the *Vango Media* decision, the divergent opinions of the *Cipollone* court did unanimously agree that this phrase covers "positive enactments" of political subdivisions, such as statutes and regulations. *Vango Media*, 34 F.3d at 72 (citing *Cipollone*, 505 U.S. at 519, 112 S.Ct. at 2619-20 (plurality opinion), 505 U.S. at 535, 112 S.Ct. at 2627 (Blackmun, J., concurring in part, dissenting in part), 505 U.S. at 548, 112 S.Ct. at 2634 (Scalia, J., concurring in part, dissenting in part)).

Article 17-A, a local law enacted by New York City that would prohibit tobacco advertisements in certain zones, is therefore within the scope of the first portion of Section 1334(b). *See e.g. Rockwood v. City of Burlington*, No. 98 Civ. 223, 1999 WL 656397, at *4 (D. Vt., Sept. 21, 1998).

B. Based on Smoking and Health

The second phrase of Section 1334(b)—"based on smoking and health"—has sparked a heated debate in the motion papers.

Defendants argue that since the express purpose of Article 17-A does not talk about smoking and health, it is not preempted by FCLAA. *See* Defs.' Mem. Law at 40. It is clear, however, that the Court must not rely solely on the legislator's professed motivation for writing the law for the preemption inquiry, but must also examine the law's effect. *See Gade v. National Solid Wastes-Management Ass'n*, 505 U.S. 88, 105 (1992) (holding that the federal Occupational Safety and Health Act of 1970 preempted a state law on the training, testing and licensing of hazardous waste site workers). The Supreme Court stated in *Gade* that "[i]n assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purposes and have looked as well to the effects of the law." *Id.* at 105. *Accord Vango Media*, 34 F.3d at 73-74, The decision cited extensively from precedent decided "over two decades ago" to support this approach:

> We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.

Gade, 505 U.S. at 105-06 (citing *Perez v. Campbell*, 402 U.S. 637, 651-652 (1971)). Therefore, notwithstanding the fact that the stated purpose of Article 17-A is to enforce laws banning the sale of tobacco products to minors, the requisite analysis in not satisfied by taking the "legislative intent" section of Local Law 3 at face value.

Plaintiffs contend that a review of the legislative history reveals that the legislators were primarily concerned with the health risks for youth who smoke when enacting Article 17-A. *See* Pls.' Mem. Law at 15-17. The Court agrees that the transcripts from the public hearings on Article 17-A held by the Committee on Health and the Committee on Youth Services, are "replete" with references to health concerns, made by the sponsors of Article 17-A and other Council members. In just one example, Speaker Vallone stated during the public hearings held by the Health Committee, that "[o]ur kids have a right to grow up healthy, and we as adults have the obligation to help them do so [. . .] [s]o this City Council in once again going to do its share to meet that obligation." *See* Jt. Stip. Docs. Ex. 4, at 11. Indeed, the more accurate characterization would be that the majority of references in the hearings are devoted to decrying the use of advertising to entice children to smoke, thereby exposing them to addiction, and the many tobacco-related illnesses. *See generally* Jt. Stip. Docs. Exs. 4-8.

Defendants argue that the declaration of legislative intent "makes it clear that the primary purpose of the law is to decrease the illegal sales" of tobacco products, and "although health related concerns are mentioned in the document, they are secondary and supporting elements." *See* Defs.' Reply at 6. The Court is not persuaded that the ranking of purposes in this fashion is borne out by the record.[3] Furthermore, the dis-

[3] Moreover, even if the primary/secondary nomenclature were supported, Defendants' appear to be relying too heavily on dicta from *Vango Media* to distinguish the instant case. The Second Circuit stated in *Vango Media* that the City's purported economic motivations behind the ordinance occupied a "secondary role" to the "primary interest" of public health, and therefore, the ordinance was "based on smoking and health" for preemption purposes. 34 F.3d at 73. These terms were utilized in the context of the *Gade* analysis that stated "our precedents leave no doubt that a dual impact state regulation cannot avoid [. . .] preemption simply because the regulation serves several objectives rather than one." 505 U.S. 88, at 106. Indeed, "*whatever the purpose or purposes of the state law*, preemption analysis cannot ignore the effect of the

tinction Defendants attempt to erect between the two purposes collapses once it in recognized that the underlying purpose of laws banning sales of cigarettes to minors is public health.[4] In the hopes of the legislators and in practical effect therefore, the impact of Article 17-A would be to lessen the chance that youth would take up smoking and be exposed to the concomitant health dangers. Other courts faced with comparable justifications for local ordinances threatened with preemption by FCLAA have come to similar conclusions. *See Federation of Advertising Indus. Reps. v. City of Chicago*, 12 F.Supp. 2d 844, 850-852 (N.D. Ill. 1998) (finding distinction between goal of enforcing ban on sales and of promoting public health evaporated where goal of sales ban was also to promote public health); *Rockwood*, 1998 WL 656397, at *5 ("[i]t strains credulity to adopt the rationale that the City's Ordinance is unrelated to smoking and health, merely because the City has stressed its purpose of reducing illegal activity by minors").

Defendants also argue that "the fact that the laws banning such sales may have been enacted, in part, because the City wished to protect children's health in of no moment with respect to the issue of preemption since Congress . . . expressly stated that laws prohibiting sales to minors are *not* preempted." *See* Defs.' Mem. Law at 39, n. 20. In support, Defendants refer the Court to the following portion of the Senate Report for FCLAA:

> The State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health.

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challenged state action on the pre-empted field [. . .] the key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted." *Id.* at 106-107. Whether or not one purpose can be ranked above the other is therefore beside the main point of whether or not the impact of the ordinance will fall within the preempted arena.

[4] Defendants do not dispute that the existing laws banning the sales of cigarettes to minors were compelled by the serious health problems associated with smoking. *See* Pls. Opp. at 9, n. 6.

> It would in no way affect the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations.

See Defs.' Mem. Law at 39, citing S. Rep. No. 91-566, 91st Cong., 2d Sess. reprinted in 1970 U.S. Code Cong. & Ad. News, 2652, 2663 (emphasis added). The fact that such police regulations banning sales of cigarettes to minors do not fall under the preemptive scope of FCLAA is not in dispute. It is also not in dispute that those kind of police regulations are clearly not related to the advertising and promotion of cigarettes, whereas Article 17-A may well be. That distinction defeats Defendants argument. *See Vango Media*, 34 F.3d at 74-75 ("while sales restrictions and smoking prohibitions have little in common with advertising or promotion, the Local Law directly impacts advertisers and promoters because it imposes conditions on their display of cigarette advertisements").

Therefore, since laws banning sales of tobacco products to minors have been implemented due to public health concerns, since the legislative history of Article 17-A reveals the health dangers posed to youth from smoking was of paramount importance in enacting the ordinance, and since the practical effect of the Article 17-A would be to restrict youth access to tobacco in order to reduce the incidence of smoking among youth in order to protect their health, the Court concludes that Article 17-A on "based on smoking and health."

C. With Respect to the Advertising or Promotion of Any Cigarettes

Whether the third phrase of Section 1334(b)—"with respect to the advertising or promotion of any cigarettes"—is appropriately applied to Article 17-A, has engendered the deepest split of opinions in this litigation.

Defendants[5] insist that the appropriate reading of this phrase is that only those requirements or prohibitions that affect the "content" of tobacco brand advertising are preempted, but those laws that delineate the "location" of such advertising are outside of the scope of FCLAA's preemption provision. *See* Defs.' Amic. at 2. This content/location distinction is touted for its ease of comprehension, and that it "frees courts from the business of determining legislative purpose." *Id.* As tempting as this sounds, the Court finds no support for such a distinction, either in FCLAA itself or in the precedent that is binding on this Court.

Faced with a similar content/location argument, the Second Circuit found no basis to restrict the preemptive scope of § 1334(b) to those regulations that affect content. *See Vango Media*, 34 F.3d at 73-74. The explicit language of § 1334(b)—"with respect to"—connotes a broad preemptive effect. *Id.* at 74 (analyzing both Supreme Court precedent and dictionary definitions). The expressed intent of FCLAA was to avoid "diverse, nonuniform, and confusing labeling and advertising regulations with respect to any relationship between smoking and health." *Id.* at 74 (citing *Cipollone*, 505 U.S. at 519, 112 S.Ct. at 2619). To the Second Circuit, this phrase did not leave room for the ordinance under review to evade the preemptive scope of § 1334(b). *Id.* ("[i]n requiring permit holders who display cigarette advertising also to display anti-smoking messages, the [ordinance] treads on the area of tobacco advertising, even if it does so only at the edges").

Defendants seek to distinguish the *Vango Media* precedent as relevant only to regulations that effect the content of cigarette advertising. *See* Defs.' Amic. at 10. Defendants argue that the ordinance analyzed by the Second Circuit "would have altered the message of cigarette brand advertising" by requiring the periodic display of anti-smoking

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[5] This argument is taken on in particular depth by the amici curiae in support of the Defendants' position. *See* Mem. Law of Amici Curiae in Support of Youth Protection Against Tobacco Advertising and Promotion Act ("Defs.' Amic."), at 2.

messages, and contend that Article 17-A, by contrast, "neither dictates advertising content nor forces any tobacco advertiser to communicate any message against its will." *Id.* The Court does not believe such a bright-line distinction can be drawn between Article 17-A and the ordinance analyzed in *Vango Media*. In one sense, the ordinance in *Vango Media* has more effect on content, because the permit holders would have been required to present a content-specific message (i.e. anti-smoking) for every four advertisements promoting tobacco. However, there would have been no change in the actual tobacco advertisements themselves. Indeed, the Second Circuit stated in *Vango Media*, that "the actual cigarette advertisements would not look different were we to permit the City to impose the mandated public health messages[,] [n]onetheless advertisers and promoters [. . .] would be substantially impacted by the [ordinance's] requirements." 34 F.3d at 74. This finding, the court noted, was mandated by the "more expansive reach" of the amendments to § 1334(b). *Id.* at 74.

While it is true that the instant facts differ from those of *Vango Media* in that Article 17-A does not impose the issuance of an anti-smoking message on advertisers, Article 17-A would still have a substantial impact on the advertisers and promoters by limiting severely those areas where their advertising could be placed. As set forth in *Vango Media*, Article 17-A "directly impacts advertisers and promoters because it imposes conditions on their display of cigarette advertisements." 34 F.3d at 75. Given the broad interpretation accorded § 1334(b) by the Second Circuit and the broad impact that would be felt by the implementation of Article 17-A, the Court sees no basis for Article 17-A to evade preemption.

Defendants rely heavily on the Fourth Circuit case of *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore* to support the application of the content/location distinction. 63 F.3d 1318 (4th Cir. 1995), *vacated on other grounds*, 518 U.S. 1030, *on remand*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1569 (1997). In *Penn Advertising*, the Baltimore

ordinance banned cigarette advertising in any "publicly visible location," with exceptions for buses, taxis, commercial vehicles used to transport cigarettes, businesses licensed to sell cigarettes, and in certain commercial and industrial zones of the city. 63 F.3d at 1321. On the question of preemption by FCLAA, the Fourth Circuit concluded that the local law was not preempted since it "limits only the location of signs that advertise cigarettes, but it does not address the content of such advertisements." *Id.* at 1324. The court cited to the following support for its narrow reading of FCLAA preemption:

> Were the preemption provision to be interpreted so broadly, the Supreme Court in *Cipollone* could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud, and conspiracy—all of which relate generally to the effects on health of promoting the sale of cigarettes.

Id. at 1324 (citing to *Cipollone*, 505 U.S. at 523-31, 112 S.Ct. at 2621-25). While the Court agrees with Defendants that the Baltimore ordinance challenged in the Fourth Circuit has much in common with Article 17-A, the Court finds the reasoning of that decision unpersuasive, especially in light of the clear guidance to the contrary by the Second Circuit in *Vango Media*. *See Federation of Advertising Indus. Reps.*, 12 F.Supp. at 847 (declining to follow *Penn Advertising*, noting that the content/location distinction utilized is not found anywhere in the congressional language of FCLAA).

Even as the Court finds the content/location distinction put forth by Defendants as misaligned with the teaching of *Vango Media*, the adoption of Defendants' distinction would still not lead the Court to an alternate result. Article 17-A does not appear to fit the description of an ordinance that "regulate[s] only the location or placement of outdoor tobacco advertising." *See* Defs.' Amic. at 10.[6] Article 17-A would allow only

[6] Defendants have divided up various ordinances that have undergone litigation into three categories: 1) laws that regulate only the loca-

so-called "tombstone" signs within ten feet of the entrance to any premises selling cigarettes, with strict limits on the text, size and format. Two cases cited by the parties have addressed similar local laws with tombstone requirements, and have resulted in different conclusions. In *Chiglo v. City of Preston*, 909 F.Supp. 675, 678 (D. Minn. 1995), the district court found an ordinance that banned all tobacco brand advertisements inside retail stores except for generic tombstone signs for the interior and exterior of stores selling cigarettes, as preempted by FCLAA. In so doing, the court found that the provisions mandating the content of tombstone signs distinguished the law from the pure location prohibitions addressed in *Penn Advertising*, where "the ordinance [. . .] directed tobacco billboards, regardless of their content, away from residential neighborhoods." 909 F.Supp. at 678. The court also expressly adopted the *Vango Media* finding that the existence of one permissible goal for an ordinance did not save it from preemption where it was still based on smoking and health. *Id.* at 678. In contrast, the court in *Lindsey v. City of Tacoma*, No. C97-5076 (RJB), slip. op. at 10-14, 1997 U.S.Dist. LEXIS 20952, *27 (W.D. Wash. Nov. 6, 1997), found that a Tacoma local law prohibiting all outdoor advertisements of tobacco products but allowing the posting of price and availability information in tombstone format outside licensed retailers, was not preempted by Section 1334(b) of FCLAA. Specifically, the court found the absence of an "imposition of a duty or condition for cigarette advertisements, only a limitation on their location and format" distinguished the case from *Vango Media*. *Id.* The court also stated that the local law did not "impact the content of those advertisements as to the warning information." and "even [the section which] dictates the format for tombstone advertisements, does not prescribe the content of those advertisements [but] simply requires that

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tion of outdoor tobacco advertising; 2) laws that affect the content of tobacco advertising; and 3) laws that disseminate tobacco product consumer information. *See* Defs.' Amic. at 8-14.

tombstone advertisements state 'truthful, factual information . . . .' " *Id.* at 23.

Not surprisingly, both parties claim the favorable holding for their side represents the correct interpretation of ordinances with provisions for tombstone signs. The instant case differs from that of *Lindsey* in so far an Article 17-A does specify the exact content of the tombstone signs. *See* Jt. Stip. Does., Ex. 1, at 8. Therefore, the Court finds the *Chiglo* holding to be more on point. The bottom line, however, is that under Article 17-A, the only allowable advertisement of tobacco products in certain locations would be a uniform statement dictated by the City. The Court is not persuaded that by characterizing the tombstone signs as "simply informational notices with respect to the nature of the store," it can be concluded that Article 17-A does not impose content restrictions on advertisements. *See* Defs.' Mem. Law at 17, n. 9. The term "advertisement"—defined in Black's Law dictionary as "notice given in a manner designed to attract public attention"—is not so narrow to indicate only "product advertisements [. . . that] sell a particular brand." *Id.* While it is true that cigarette manufacturers will usually only promote consumption of their own brand, this reality does not mean that an announcement that cigarettes are for sale in a store does not still serve the same purpose of promoting the sale of cigarettes. *See e.g.* Article 17- A, § 27-508.2(m), Jt. Stip. Docs. 1, at 7, defining "tobacco product advertisement" as having "the purpose or effect . . . to promote the use or sale of a tobacco product." To argue that such a law does not effect the content of advertisements appears to fly in the face of logic.

Defendants also contend that the content/location distinction comports with the intent of Congress in passing FCLAA, a point that Plaintiffs challenge. *See* Defs.' Amic. at 3-8; Pls.' Opp. at 18-19. The Court sees no need to address these arguments, however, in light of the fact that both the Supreme Court and the Second Circuit have directed that reliance on the express preemption provision is appropriate, and have

provided detailed analyses of the scope of that provision. *See Vango Media*, 34 F.3d at 72.[7]

Accordingly, the Court finds that Article 17-A qualifies as a requirement or prohibition based on smoking and health, with respect to the advertising or promotion of cigarettes, and is therefore expressly preempted by Section 1334(b) of FCLAA.

D. Severance

In a footnote in Defendants' opposing brief, Defendants remark "it must be noted that to the extent the Tobacco Advertising Act is preempted, the preemption would only apply to the portion of the Act dealing with cigarette advertisements since the Federal Act only covers cigarettes, the packages of which contain mandated warnings." Defs.' Opp. Br. at 27, n.18.. No further argument is offered on this topic by Defendants.[8]

Article 17-A applies by its terms to any "tobacco product advertisement," where "tobacco product means a cigarette, smokeless tobacco or cigarette tobacco."[9] *See* Jt. Stip. Doc. 1, at 7, §§ 27-508.2(1), 27-508.3. FCLAA applies only to cigarette packaging. *See generally* 15 U.S.C. §§ 1332(1), 1333.[10] Defendants appear to ask that if FCLAA preemption

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[7] The Court does note, however, that Defendants' contention that Senator Frank Moss of Utah "surely would have spoken against" the FCLAA 1969 Amendment if it had been understood to preempt local restrictions on the location of advertisements, in light of Utah's 1969 law banning all outdoor and point-of-sale tobacco advertisements, is not persuasive. *See* Defs.' Amic. at 5-6.

[8] Defendants do mention severance, again in a footnote, in the context of the tombstone sign provision of Article 17-A. *See* Defs.' Reply at 5, n.1

[9] "Cigarette tobacco" is defined as "any product that consists of loose tobacco and in intended for use by consumers in a cigarette." *See* Jt. Stip. Doc. 1, at 6, § 27-508.2(d)

[10] The "Comprehensive Smokeless Tobacco Health Education Act" (the "Act"), 15 U.S.C. §§ 4401-4408, applies similar requirements as

is found, for the Court to sever those portions of Article 17-A that apply to cigarettes from other tobacco products.

Whether severance is appropriate is governed by New York law. *National Advertising Co. v. Town at Niagara*, 942 F.2d 145, 148 (2d Cir. 1991). Under New York law, there is a preference to sever in lieu of invalidating the entire statute. *Id.* at 148. "Although the presence of a severability clause is not dispositive, the preference for severance is particularly strong when the law contains a severability clause." *Gary D. Peake Excavating, Inc. v. Town Board of Hancock*, 93 F.3d 68, 72 (2d Cir. 1996) (internal citations omitted). The New York standard is as follows:

> The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots.

People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48, 60 (1920), *cert. denied*, 236 U.S. 702 (1921). In other words, "severance is inappropriate when the valid and invalid provisions are so intertwined that excision of the invalid provisions would leave a regulatory scheme that the legislature

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FCLAA on the packaging of smokeless tobacco products. *See* 15 U.S.C. § 4402; *see generally Brown & Williamson Tobacco Corp. v. Food and Drug Administration*, 153 F.3d 155, 174-175 (4th Cir. 1998) (discussing statutory provisions and comparison to FCLAA); *Public Citizen v. Federal Trade Comm'n*, 869 F.2d 1541, 1553-1557 (D.C.Cir. 1989) (same). At least one court has found that the language of the Act's preemption provision is significantly narrower than that of FCLAA. *See* 15 U.S.C. § 4406(b); *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 77 (1st Cir. 1997); *see also Cipollone* 505 U.S. at 520 (plurality) (finding "with respect to" language of FCLAA preemption broader than the "in the advertising of" phrase of the earlier version). However, since the parties do not address this, and it is not necessary to the Court's decision, the Court will not rule on this issue.

never intended." *New York State Superfund Coalition, Inc. v. New York State Dep't of Envtl, Conservation*, 75 N.Y.2d 88, 94, 550 N.Y.S. 2d 879, 881 (1989).

Article 17-A does contain a general severability clause. *See* Jt. Stip. Doe. 1, at 12, § 10. However, the Court finds that the treatment of cigarettes and other tobacco products within Article 17-A in so intertwined, that severance is not possible without perverting the apparent intent of the Council. Defendants have not pointed to support in the legislative record for their assertion that the Council would accomplish its intent by applying the ordinance only to non-cigarette tobacco products. Indeed, parties have not directed the Court to any part of the hearings on Article 17-A that dealt specifically with tobacco products that are not cigarettes. In the section of Article 17-A entitled declaration of legislative intent, references to the impact of advertising on youth focus on cigarette advertising and cigarette smoking. Indeed, while the five-page section contains abundant references to the increase in cigarette smoking among youth, there is only one short paragraph referring to similar increase in the use of smokeless tobacco by youth. *See id.* at 2. On this record, the Court cannot conclude that the purported legislative agenda to increase the enforcement of laws banning sales of tobacco products to minors would be accomplished by enacting the restrictions of Article 17-A to smokeless tobacco and loose tobacco alone. *See e.g. Federation of Advertising Indus. Reps.*, 12 F.Supp 2d at 852-53 (where the legislative record treated of restrictions on cigarette and alcohol as a "paired entry" or as focusing solely on cigarettes, alcohol advertising restrictions of local ordinance did not survive invalidation of ordinance under FCLAA preemption). *Cf. Rockwood*, 1998 WL 656397, at *11 (allowing for severance where prohibition against "self-service" tobacco sales displays was capable of being executed in accordance with city's legislative intent of reducing underage tobacco use, and independently of pre-empted portions of cigarette advertising restrictions).

Accordingly, Defendants request for severance is denied.

III. CONCLUSION

For the above stated reasons, Plaintiffs' motion for summary judgment is GRANTED on the grounds of federal preemption. Defendants' cross-motion for summary judgment on those same grounds is DENIED. Defendants' request to sever those portions of the challenged ordinance that apply to tobacco products other than cigarettes is DENIED. In light of this finding, the Court has not reached the parties constitutional arguments.

In accordance with Plaintiffs' prayer for relief in the Complaint, the Court DECLARES that Article 17-A of Title 27 of the Administrative Code of the City of New York is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), and the Supremacy Clause of the United States Constitution, Article IV, clause 2, and therefore, is without force or effect. Defendants are permanently enjoined from enforcing Article 17-A.

The Clerk is directed to close the docket in this matter.

SO ORDERED.

Dated: New York, New York
December 15, 1998

/s/ DEBORAH A. BATTS
Deborah A. Batts
U.S.D.J.

Article 17-A

Youth Protection Against Tobacco Advertising and Promotion Act

§ 27-508.1 Short title.
§ 27-508.2 Definitions.
§ 27-508.3 Tobacco product advertisement restriction.
§ 27-508.4 Non-compliant advertisements to be removed.
§ 27-508.5 Sponsorship of and at events.
§ 27-508.6 Injunctive relief.

§ 27-508.1 Short title. This article shall be known and may be cited as the "Youth Protection Against Tobacco Advertising and Promotion Act."

§ 27-508.2 Definitions. For the purposes of this article, the following terms shall be defined as follows:

a. "Amusement arcade" means any enclosed business establishment, open to the public, whose primary purpose is the operation of coin-operated amusement devices within the meaning of subchapter three of chapter two of title 20 of this code.

b. "Child day care center" means (i) any child care arrangement, public, private or parochial child care center, school-age child care program, day nursery school, kindergarten, play school or other similar school or service operating pursuant to authorization, license or permit of the city or state, (ii) any facility that provides child care services as defined in section four hundred ten-p of the New York state social services law, or (iii) any child day care center as defined in section three hundred ninety of the New York state social services law. The definition of "child day care center" applies whether or not care is given for compensation but does not include child day care centers located in private dwellings and multiple dwelling units.

c. "Cigarette" means any product which consists of (i) any roll of tobacco wrapped in paper or in any substance not containing tobacco or (ii) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling is offered for use or purchase by consumers as a cigarette described in (i) of this subdivision.

d. "Cigarette tobacco" means any product that consists of loose tobacco and is intended for use by consumers in a cigarette.

e. "Multiple dwelling" means any building or structure that may lawfully be occupied as the residence or home of three or more families living independently of each other.

f. "Multiple dwelling unit" means any unit of residential accommodation in a multiple dwelling.

g. "Person" means any natural person, partnership, co-partnership, firm, company, corporation, limited liability corporation, agency as defined in section eleven-hundred fifty of the New York city charter, association, joint stock association or other legal entity.

h. "Playground" means any outdoor premises or grounds owned or lawfully operated by or on behalf of, the board of education, the department of parks and recreation, or any public, private or parochial school, any child day care center or any youth center, which contains any device, structure or implement, fixed or portable, used or intended to be used by persons under the age of eighteen for recreational or athletic purposes including, but not limited to, play equipment such as a sliding board, swing, jungle gym, sandbox, climbing bar, wading pool, obstacle course, swimming pool, seesaw, baseball diamond, athletic field, or basketball court.

i. "Private dwelling" means any building or structure or portion thereof that may lawfully be occupied for residential purposes by not more than two families, including the grounds of such building or structure.

j. "School building" means any building or structure or any portion thereof, owned, occupied by, or under the custody or control of any public, private or parochial institution and lawfully used for the primary purpose of providing educational instruction to students at or below the twelfth grade level.

k. "Smokeless tobacco" means any product that consists of cut, ground, powdered, or leaf tobacco that is intended to be placed by the consumer in an oral cavity.

l. "Tobacco product" means a cigarette, smokeless tobacco or cigarette tobacco.

m. "Tobacco product advertisement" means any written word, picture, logo, symbol, motto, selling message, poster, placard, sign, photograph, device, graphic display or visual image of any kind, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of tobacco product, or any combination thereof, the purpose or effect of which is to promote the use or sale of a tobacco product through such means as, but not limited to, the identification of a brand of a tobacco product, a trademark of a tobacco product or a trade name associated exclusively with a tobacco product.

n. "Tobacco product promotion" means (i) any item or service marketed, licensed, sold or distributed, whether indoors or outdoors, which is not a tobacco product but which bears the brand of a tobacco product, a trademark of a tobacco product or a trade name associated exclusively with a tobacco product, alone or in conjunction with any written word, picture, logo, symbol, motto, selling message, poster, placard, sign, photograph, device, graphic display or visual image of any kind, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with those used for any brand of a tobacco product, or (ii) any gift or item other than a tobacco product offered or caused to be offered to any person purchasing a

tobacco product in consideration of the purchase thereof, or to any person in consideration of furnishing evidence, such as credits, proofs-of-purchase, or coupons, of such purchase; provided, however, that a tobacco product promotion shall not include any gift or item provided through the exchange or redemption through the mail of any such credits, proofs-of-purchase, coupons or other evidence of the purchase of a tobacco product.

o. "Youth center" means any building or structure or portion thereof, lawfully occupied by any person for the primary purpose of operating a trade school (including those conducting after-school, vocational, remedial, tutorial, educational assistance programs) or an indoor recreational center (including recreational, cultural, physical fitness, or sports programs) for persons under the age of eighteen years, and which has been certified as such to the department in accordance with the procedure to be set by the department. Such certification shall be accepted by the department but nothing in this subdivision shall prevent the commissioner from removing a certified youth center from consideration as a youth center if she or he determines it does not meet the criteria of a youth center.

§ **27-508.3 Tobacco product advertisement restriction.** a. It shall be unlawful for any person to place, cause to be placed, to maintain or to cause to be maintained, a tobacco product advertisement within one thousand feet, in any direction, of any school building, playground, child day care center, amusement arcade or youth center, in any outdoor area including, but not limited to, billboards, roofs and sides of buildings, rolling shutters or gates, any enclosures into which rolling shutters or gates retract, water tanks and towers and free-standing signboards; provided, however, that any tobacco product advertisement on an awning projecting from the outside of a premises as of July 1, 1997 where tobacco products are sold or offered for sale may be retained until two years from the effective date of this law.

b. It shall be unlawful for any person to place, cause to be placed, to maintain, or cause to be maintained, a tobacco product advertisement in the interior of a building or structure which is within one thousand feet, in any direction, of any school building, playground, child day care center, amusement arcade or youth center, when such advertisement is within five feet of any exterior window or any door which is used for entry or egress by the public to the building or structure; provided, however, that tobacco product advertisements may be placed or maintained in the interior of any such premises where such advertisements are (i) parallel to the street and face inward, or (ii) affixed to a wall panel or similar fixture that is perpendicular to the street regardless of whether such advertisements are illuminated or not illuminated.

c. Nothing in this section shall prevent a person from placing, causing to be placed, maintaining, or causing to be maintained, a single sign, poster, placard or label no larger than six square feet and containing only black text, in any language, not exceeding eight inches in height on a white background stating "TOBACCO PRODUCTS SOLD HERE" or such words translated into any language, within ten feet of an entrance to the premises where tobacco products are sold or offered for sale.

d. Nothing in this section shall prevent a tobacco product manufacturer, distributor or retailer from placing, causing to be placed, maintaining or causing to be maintained, its corporate or other business name on a building or structure, in any location, where such building or structure or a portion thereof is owned, operated or leased by such manufacturer, distributor or retailer and that building or structure is the principal place of business of such manufacturer, distributor or retailer in the city of New York; provided, however, that the corporate or other business name of such manufacturer, distributor or retailer is registered or filed in the United States or such manufacturer, distributor or retailer is authorized to do

business in any state, and the corporate or business name of such manufacturer, distributor or retailer does not include any brand name or trademark of a tobacco product, alone or in conjunction with any written word, picture, logo, symbol, motto, selling message, poster, placard, sign, photograph, device, graphic display or visual image of any kind, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of a tobacco product.

e. This section shall not apply to any tobacco product advertisement on a motor vehicle. Nothing in this subdivision shall be construed to authorize the placement of a tobacco product advertisement in a location where such placement is otherwise prohibited by the rules of the department of transportation or other applicable law.

§ **27-508.4 Non-compliant advertisements to be removed.** The owner, operator or lessee of any location or premises where a tobacco product advertisement is prohibited or restricted pursuant to the requirements of section 27-506.3 of this article shall have thirty days from the effective date of the local law that added this section to remove any non-compliant tobacco product advertisements.

§ **27-508.5 Sponsorship of and at events.** Nothing in this article shall prevent a tobacco products manufacturer, distributor, or retailer who sponsors, in whole or in part, any athletic, musical, artistic, or cultural event, or team or entry in a competition or exhibition in any location from displaying or causing to be displayed the corporate or other business name of such sponsor; provided, however, that the corporate or other business name of such sponsor is registered or filed in the United States or such sponsor is authorized to do business in any state, and the corporate or other business name of such sponsor does not include any brand name or trademark of a tobacco product, alone or in conjunction with any written word, picture, logo, symbol, motto, selling message, poster, placard, sign, photograph, device, graphic display or visual

image of any kind, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of a tobacco product.

§ **27-508.6 Injunctive relief.** Whenever any person has engaged in any act or practice which constitutes a violation of any provision of this article or of section 11-1303 of this code or of any rule promulgated thereunder, the city may make application to a court of competent jurisdiction for an order enjoining such act or practice.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Argued March 6, 1995
Decided Aug. 31, 1995
No. 94-2141

PENN ADVERTISING OF BALTIMORE INCORPORATED,

Plaintiff-Appellant,

—v.—

MAYOR AND CITY COUNCIL OF BALTIMORE, A Municipal Corporation; Kurt L. Schmoke, in his official capacity as Mayor of Baltimore City; David Tanner, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Defendants-Appellees.

The American Advertising Federation; the American Association of Advertising Agencies; the Association of National Advertisers, Incorporated; the Outdoor Advertising Association of America, Incorporated; Washington Legal Foundation; the City of Cincinnati, Ohio; the Maryland Congress of Parents & Teachers, Incorporated; the Coalition for Beautiful Neighborhoods; Baltimore City Wide Liquor Coalition for Better Laws and Regulations; City and County of San Francisco; City of San Jose,

Amici Curiae.

ARGUED: Eric Michael Rubin, Rubin, Winston, Diercks, Harris & Cooke, Washington, DC, for appellant. Burton Harry Levin, Assistant Solicitor, Baltimore, MD, for appellees. ON BRIEF: Walter E. Diercks, Jeffrey Harris, Rubin, Winston, Diercks, Harris & Cooke, Washington, DC, for appellant. Neal M. Janey, City Solicitor, Sandra R. Gutman, Associate Solicitor, Department of Law, Baltimore, MD, for appellees. Richard E. Wiley, Lawrence W. Secrest, III, Daniel E. Troy, Luis de la Torre, Frank Winston, Jr., Wiley, Rein & Fielding, Washington, DC, for amici curiae American Advertising Federation, et al. Mark S. Yurick, Senior Assistant City Solicitor, Office of the City Solicitor, Cincinnati, OH, for amicus curiae City of Cincinnati. Daniel J. Popeo, Richard A. Samp, Washington Legal Foundation, Washington, DC, for amicus curiae Washington Legal Foundation. Donald Garner, Professor of Law, Southern Illinois University, Carbondale, IL; the Maryland Congress of Parents & Teachers, Inc., Baltimore, MD, for amicus curiae Maryland Congress. Christopher J. Fritz, Julie Eilen Squire, Thomas C. Dame, Gallagher, Evelius & Jones, Baltimore, MD, for amici curiae Coalition for Beautiful Neighborhoods, et al. Louise H. Renne, City Attorney, Dannis Aftergut, Chief Assistant City Attorney, Barbara Solomon, Deputy City Attorney, John Cooper, Deputy City Attorney, San Francisco, CA, for amicus curiae San Francisco; Joan Gallo, City Attorney, George Rios, Assistant City Attorney, San Jose, CA, for amicus curiae San Jose.

Before NIEMEYER and HAMILTON, *Circuit Judges*, and BUTZNER, *Senior Circuit Judge*.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge HAMILTON and Senior Judge BUTZNER joined.

OPINION

NIEMEYER, *Circuit Judge*:

We must decide in this case (1) whether Ordinance 307 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor, "advertising that advertises cigarettes" in certain areas of the City, is preempted by the Federal Cigarette Labeling and Advertising Act or by Maryland statutes prohibiting the sale of cigarettes to minors or the possession of cigarettes by minors; and (2) whether that ordinance violates the First and Fourteenth Amendment protections of commercial speech. The district court, granting Baltimore's motion for summary judgment, ruled that neither federal nor state law preempts the operation of Baltimore's ordinance and that the ordinance is a permissible regulation of commercial speech under the four-part test announced in *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 US. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). We affirm.

I

Even before 1994, it was illegal in Maryland for any person to purchase cigarettes for, or sell them to, "any individual under the age of 18 years." Md.Ann.Code art. 27, § 404 (1992). In 1994, Maryland also enacted statutes, effective October 1, 1994, prohibiting minors from using or possessing "any tobacco product." Md.Ann.Code art. 27, §§ 404 & 405A (Supp.1994). A few months earlier, in April 1994, the Mayor and City Council of Baltimore (collectively "Baltimore"), in a further effort to reduce the illegal consumption of cigarettes by minors, enacted Ordinance 307. The ordinance prohibits the placement of any sign that "advertises cigarettes in a publicly visible location," *i.e.* on "outdoor billboards, sides of building[s], and free standing signboards."[1] The prohibition

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[1] The core provision of Ordinance 307 provides:

> Cigarette advertisements. No person may place any sign, poster, placard, device, graphic display, or other form of advertising

contained in Ordinance 307 parallels the scope and language of Baltimore City Ordinance 288, enacted in January 1994, which regulates the advertising of alcoholic beverages. Thus, the prohibition against cigarette advertising in Ordinance 307 mirrors Ordinance 288's exceptions permitting such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes, including professional sports stadiums. As with Ordinance 288, Ordinance 307 also contains an exception permitting such advertising in certain commercially and industrially zoned areas of the City.

Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously-conducted studies detailing the correlation between cigarette advertising and the consumption of cigarettes by minors. The City Council found, as expressed in the preamble to Ordinance 307, that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors." It referred specifically to 10 studies and articles supporting that position. The City Council also relied on the 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education to support its conclusion that cigarettes are the second most commonly abused substance by Maryland adolescents, with approximately 42% of twelfth graders and 11% of sixth graders having smoked cigarettes in the previous 12 months. The City Council emphasized further that 75% of twelfth graders had smoked cigarettes before the age of 15. It noted that cigarettes constitute a "gateway drug" for Maryland students, as they are often the first drug used by adolescents and "appear[ ] to 'open the door' for use of other

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that advertises cigarettes in a publicly visible location. In this section "publicly visible location" includes outdoor billboards, sides of building[s], and free standing signboards.

Baltimore City Code, Art. 30 (zoning), § 10.0-1(I). By its terms, the ordinance became effective April 6, 1994.

harder drugs at a later date." Therefore, to reduce the illegal consumption of cigarettes by minors, the City Council concluded that it would be reasonable to restrict the placement of publicly visible cigarette advertisements in the City.

On April 6, 1994, the date on which Ordinance 307 became effective, Penn Advertising of Baltimore, Inc., filed suit in federal court to enjoin the ordinance's enforcement and to obtain a declaratory judgment (1) that the ordinance is preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), and by Maryland statutes regulating the sale of cigarettes, and (2) that the ordinance violates the First and Fourteenth Amendments. Penn Advertising, which leases land from private property owners, maintains outdoor signs on those locations, and rents them to its customers, filed suit to protect its business of placing cigarette advertisements on outdoor signs located in Baltimore.

With its complaint, Penn Advertising filed a motion for a preliminary injunction to enjoin, pending litigation, enforcement of Ordinance 307. In response, Baltimore filed a motion to dismiss or, in the alternative, for summary judgment. While Penn Advertising obtained some discovery following the filing of these motions, it desired to conduct more discovery and thus filed a motion to extend the time to file its opposition to Baltimore's summary judgment motion. The district court denied the motion and established a briefing schedule for the parties. The court also entered an order staying enforcement of the ordinance.

On August 15, 1994, the district court filed a memorandum opinion granting Baltimore's motion for summary judgment. The district court concluded that Ordinance 307 is preempted neither by the Federal Cigarette Labeling and Advertising Act nor by Maryland state law. On the First Amendment issue, the court concluded that Ordinance 307 satisfied all four prongs of the *Central Hudson* test and was thus a permissible regulation of commercial speech. This appeal followed.[2]

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[2] Amici curiae briefs were received in this appeal from the American Advertising Federation, the American Association of Advertising

II

We address first a preliminary contention that the district court abused its discretion in refusing to extend Penn Advertising's time to conduct discovery and respond to Baltimore's motion for summary judgment. Penn Advertising argues that the court granted summary judgment "before there had even been adequate time for Penn Advertising to assemble a full evidentiatry record and after denying Penn Advertising's motion for leave to take discovery for the purpose of further establishing the disputed factual record."

While the district court granted Penn Advertising a short extension to respond to the motion for summary judgment, it did not generally open up the case for discovery before ruling on the issues. It concluded that such discovery was not necessary in view of the nature of the issues presented. The district court stated that the question presented are "legal questions ripe for decision" because the case concerns "a facial attack on the legal sufficiency of an ordinance." *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 862 F.Supp. 1402, 1405 (D.Md.1994). Penn Advertising nonetheless was able to oppose the motion for summary judgment with affidavits, various studies, and samples of advertising, and has failed to identify any further materials or theories which it desired, but was unable, to present to the district court.

We agree that the issues presented to the district court were questions of law which could be resolved without further development of the factual record. The preemption issue rests on a legal interpretation of the federal statute which allegedly preempts the ordinance. As the Supreme Court

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Agencies, the Association of National Advertisers, Inc., the Outdoor Advertising Association of America, Inc., the Washington Legal Foundation, the Maryland Congress of Parents & Teachers, Inc., the Coalition for Beautiful Neighborhoods, the Baltimore City Wide Liquor Coalition for Better Laws and Regulations, the City of Cincinnati, the City and County of San Francisco, and the City of San Jose.

noted in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), "the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." Our interpretation of the instant issue as involving solely a question of law is also consistent with the procedural posture of the *Cipollone* case before the Supreme Court, *i.e.* on review of a motion under Federal Rule of Civil Procedure 12(f) to strike the preemption defense as a matter of law.

Furthermore, we agree with the district court that a facial challenge to an ordinance restricting commercial speech may be resolved as a question of law when the government meets the burden placed on it by *Central Hudson*. We decided the same question in the companion case of *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir.1995), where we stated:

> [I]n response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.

63 F.3d at 1311. The determinative question in reviewing a facial challenge to an ordinance thus is whether the legislative body acted with the objectively reasonable belief that the means it selected fit the objective sought. The issue is not whether the substantive findings on which it relied are incontrovertibly true. As we explained in *Anheuser-Busch:*

> While a party [facially] challenging an ordinance can point to other factors not considered by the legislature to demonstrate that the legislature acted irrationally, it cannot subject legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other.

63 F.3d at 1312.

Since the burden of justifying the ordinance falls on the government and it may carry this burden by pointing to legislative facts, studies, history, or common sense, an understanding of the ordinance's factual impact on particular parties is not necessary to the inquiry. *Id.*, 63 F.3d at 1311-12. Accordingly, we conclude that the district court did not abuse its discretion in this case by ruling on the summary judgment motion without allowing further discovery.

III

Penn Advertising contends that Ordinance 307 is void because Baltimore's authority to enact such a measure was preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, which provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). That Act mandates that one of several specified warning messages be placed on each package of cigarettes and prohibits cigarette advertising on television and radio. *See* 15 U.S.C. §§ 1331-1340. Penn Advertising argues that since Ordinance 307's prohibition of cigarette advertising is "based on smoking and health," it is preempted by the

federal statute. Its argument rests entirely on the analysis of § 5(b) of the federal act conducted by the Supreme Court in *Cipollone v. Liggett Group, Inc.*

The lawsuit in *Cipollone* was predicated on the smoking-related death of Rose Cipollone, who began smoking in 1942 and died of lung cancer in 1984. Her son sought damages from cigarette manufacturers, contending that cigarette smoke caused his mother's death. His suit, based on New Jersey common law, alleged common law claims involving design defects; failure to warn; breach of express warranty; fraudulent misrepresentation; conspiracy to defraud; and negligence in the manner in which cigarettes were tested, researched, sold, promoted and advertised. On the cigarette manufacturers' contention that Cipollone's claims were preempted by the Federal Cigarette Labeling and Advertising Act, the Supreme Court held:

> [T]he 1969 Act pre-empts petitioner's claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not pre-empt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

505 U.S. at 530-31, 112 S.Ct. at 2625. To reach this conclusion, the Court conducted a count-by-count analysis of the common law claims to determine whether each claim implicated duties to warn or to label in connection with smoking and health. The Court explained:

> [W]e must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact preempted.

Id. at 523, 112 S.Ct. at 2621. To sort out those claims that were preempted, the Court stated:

> The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition *based on smoking and health . . . imposed under state law with respect to . . . advertising* or promotion," giving that clause a fair but narrow reading.

Id. at 523-24, 112 S.Ct. at 2621 (emphasis added). The Court went on to clarify that the appropriate inquiry is "not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." *Id.* at 525, 112 S.Ct. at 2622. *See also Vango Media, Inc. v. City of New York*, 34 F.3d 68, 73-74 (2d Cir.1994) (holding that Federal Cigarette Labeling and Advertising Act preempts ordinance requiring city-licensed facilities to display one message addressing the dangers of smoking for every four tobacco advertisements displayed).

Applying the methodology described in *Cipollone* to Ordinance 307, we conclude that the Federal Cigarette Labeling and Advertising Act does not preempt the ordinance. Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements. The ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*. Moreover, the ordinance does not limit the ability of cigarette manufacturers to advertise generally in the media. The regulation simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated. A regulation with such a general relationship to cigarette smoking—in contrast to a specific advertising "prohibition based on smoking and health"—is not preempted by the Federal Cigarette Labeling and Advertising Act. Were the preemption provision to be interpreted so broadly, the Supreme Court in *Cipollone* could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud, and

conspiracy—all of which relate generally to the effects on health of promoting the sale of cigarettes. *See Cipollone*, 505 U.S. at 523-31, 112 S.Ct. at 2621-25.

For similar reasons, we conclude that the Maryland statutes prohibiting the sale of cigarettes to minors and the use and possession of cigarettes by minors, *see, e.g.*, Md.Ann.Code art. 27, §§ 404 & 405A (supp. 1994), and Md.Ann.Code, Business Regulation art., § 16-101 *et seq.*, do not preempt the City's ordinance. Penn Advertising argues that Ordinance 307 is invalid because it impliedly was preempted by these state statutes under the doctrine of "preemption by implication" set forth in *Allied Vending, Inc. v. Bowie*, 332 Md. 279, 631 A.2d 77 (1993). The court in *Allied Vending* explained that there may be times when " 'the legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of preemption by occupation is compelled.' " *Id.* at 298, 631 A.2d 77 (quoting *Mayor and City Council of Baltimore v. Sitnick*, 254 Md. 303, 323, 255 A.2d 376 (1969)). The reasoning of *Allied Vending*, however, lends little support to Penn Advertising's claim. We can find nothing in §§ 404 and 405A of Article 27 or § 16-101 *et seq.* of the Business Regulation Article that indicates an attempt by the Maryland legislature to preempt the field of cigarette advertising. Moreover, Ordinance 307, which only limits the place and manner of cigarette advertising, is not in conflict with the state provisions prohibiting their sale to minors. For the reasons stated above, as well as those articulated by the district court in its well-reasoned opinion, *see Penn Advertising*, 862 F.Supp. at 1415-20, we reject the contention that Ordinance 307 is preempted and therefore null and void.

IV

Finally, Penn Advertising contends that Ordinance 307 is an impermissible regulation of commercial speech under the four-prong scheme announced in *Central Hudson*. As that case explains, in order for commercial speech to be entitled to

any First Amendment protection, the speech must first concern lawful activity and not be misleading. *See Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. If the commercial speech meets those threshold criteria, a state may nevertheless regulate it if (2) the state is able to assert a substantial interest in support of the regulation; (3) the state demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) the regulation is not "more extensive than is necessary" to serve the interest. *Id.* at 566, 100 S.Ct. at 2351.

The governmental interest asserted in this case is to promote compliance with the state prohibition of the sale of cigarettes to minors. The district court concluded that the ordinance also furthers the obvious public policy underlying such a prohibition, "which is to prevent the purchase, and thus the consumption, of cigarettes by minors." *Penn Advertising*, 862 F.Supp. at 1406. In the context of the current public concern over the dangers of cigarette consumption by minors, there can be little opposition to the assertion that the City's objective in reducing cigarette consumption by minors constitutes a substantial public interest.

The principal dispute in this case centers on *Central Hudson's* third and fourth prongs which question whether Ordinance 307 directly advances Baltimore's stated public interest in reducing minors' cigarette consumption and whether the ordinance is not more extensive than necessary to serve that interest, *i.e.* whether it is "narrowly drawn." The inquiry under these two prongs of *Central Hudson* involves consideration of the "fit" between the City's ends and the means chosen to accomplish them. *See United States v. Edge Broadcasting Co.*, — U.S. —, —, 113 S.Ct. 2696, 2705, 125 L.Ed.2d 345 (1993); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986).

These same issues were resolved in favor of Baltimore in the related case of *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir.1995). In *Anheuser-Busch*, the City relied on

numerous studies that linked alcohol advertising to underage drinking to meet *Central Hudson*'s third prong. In response to Anheuser-Busch's challenge to those conclusions, we stated:

> There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, we conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

63 F.3d at 1314. Similarly, in our examination of whether the advertising regulation was narrowly tailored to meet *Central Hudson*'s fourth prong, we concluded in *Anheuser-Busch*:

> If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to address, the City must be given some reasonable latitude.

63 F.3d at 1316.

For the reasons advanced in *Anheuser-Busch*, we conclude here that, while the fit between the City's objectives and the means selected to achieve them may not be perfect, it never-

theless falls well within the range tolerated by the First Amendment for the regulation of commercial speech.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 98-3191, 99-1115 & 99-1516

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit Corporation,

Plaintiff-Appellee,

—v.—

CITY OF CHICAGO, THE CHICAGO CITY COUNCIL, RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago, and PAUL WOZNICKI, in his official capacity as Zoning Administrator of the City of Chicago,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 7619—Milton I. Shadur, *Judge*.

ARGUED JUNE 10, 1999—DECIDED SEPTEMBER 1, 1999

Before HARLINGTON WOOD, JR., RIPPLE and MANION, *Circuit Judges*.

RIPPLE, *Circuit Judge*. The Federation of Advertising Industry Representatives ("the Federation") brought this action seeking declaratory and injunctive relief against a City of Chicago ordinance that restricts public advertisement of cigarette and alcohol products ("the Ordinance"). In its complaint, the Federation submitted that the Ordinance violated the First Amendment, the Contracts Clause and the Due Process Clause of the Constitution of the United States. It also alleged that the Ordinance was preempted by the Federal Cigarette Labeling and Advertising Act ("the FCLAA" or "the Act") and by state law. The district court held that the Ordinance is preempted by the FCLAA. For the reasons stated in this opinion, we affirm in part and reverse in part the judgment of the district court and remand for further proceedings consistent with this opinion.

I

BACKGROUND

Chicago adopted an ordinance restricting public advertisement of cigarette products and alcohol. The Ordinance essentially bans all publicly visible advertising of such products, and then carves out certain exceptions. For example, the Ordinance exempts signs located near highways, in certain commercial and manufacturing zoning areas, at certain sports facilities and inside stores licensed to sell alcohol and cigarette products. The Ordinance permits signs on commercial vehicles transporting such products, and signs identifying the premises where such products are sold.[1]

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[1] The text of the Ordinance states:

> (a) No person may place any sign, poster, placard or graphic display that advertises cigarettes or alcoholic beverages in a publicly visible location. In this section, "publicly visible location" includes outdoor billboards, sides of buildings, and free-standing signboards. This section shall not apply to:

(footnote continued)

The Federation submits that the Ordinance is preempted by § 5(b) of the FCLAA:

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1. (A) With respect to cigarettes, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-64 of this code; or (B) With respect to alcoholic beverages, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-60 of this code; or (C) On commercial vehicles used for transporting cigarettes or alcoholic beverages;

2. (A) With respect to cigarettes, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-64 of this code that has been placed for the purpose of identifying such premises; or (B) With respect to alcoholic beverages, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-60 of this code that has been placed for the purpose of identifying such premises;

3. Any sign that contains a generic description of cigarettes or alcoholic beverages;

4. (A) With respect to cigarettes, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-64 of this code that is provided as part of a promotion of a particular brand of cigarettes; or (B) With respect to alcoholic beverages, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-60 of this code that is provided as part of a promotion of a particular brand of alcoholic beverage;

5. Any sign at a special event, as that term is defined in section 10-8-335 of this code;

6. Any sign on a CTA vehicle;

7. Any sign on property owned, leased or operated by the Illinois Sports Facilities Authority;

8. Any sign at Comiskey Park, Soldier Field, the United Center, or Wrigley Field;

9. Any sign on property adjacent to an interstate highway; or

10. Any sign located in a C3 District (Commercial-Manufacturing), a C4 District (Motor Freight Terminal), or any M District (Manufacturing).

(footnote continued)

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b).

Congress enacted the initial version of the FCLAA in 1965. That version required conspicuous labels warning of smoking's health risks on every package of cigarettes sold in the United States. The original preemption provision of the Act stated:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334 (1965). The current version of § 5(b) was adopted in 1969. Congress then made substantial revisions to the FCLAA. In addition to amending the preemption provision, the 1969 Amendment strengthened the required warning label and banned cigarette advertising in any electronic medium subject to regulation by the Federal Communications Commission.

The district court held that the plain language of § 5(b) of the 1969 Act applied to preempt the Ordinance's cigarette advertising restrictions. *See Federation of Adver. Indus. Representatives v. City of Chicago*, 12 F. Supp.2d 844, 848 (N.D. Ill. 1998). The court also held that the regulation of alcohol advertising was not severable from the preempted regulation of cigarette advertising.

(b) This section shall not be construed to permit any display that is otherwise restricted or prohibited by law.

(c) The penalty for violation of this section shall be as set forth in section 11.13 of this Title.

R.1, Ex.A.

II

DISCUSSION

A.

Our interpretation of § 5(b) must begin with the Supreme Court's interpretation of that provision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). In *Cipollone*, the Court set out a general framework for addressing preemption involving § 5(b). Although a majority of the Court did not join all aspects of the lead opinion, a majority of the Court did agree that, in analyzing a preemption issue, we must " 'start[ ] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' Accordingly, '[t]he purpose of Congress is the ultimate touchstone' of preemption analysis." *Id.* at 516 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (internal quotation marks omitted)). In Cipollone, the Court applied these principles in determining whether various common law claims against cigarette manufacturers had been preempted by the federal Act. Here, we are confronted with a different issue. We must determine whether the language applying preemption to those state laws that regulate "with respect to advertising and promotion" preempts the Ordinance. The holding of the Court in *Cipollone* does not, of course, resolve this precise issue. The Court's analysis, however, does provide valuable insight.

The 1969 Amendment broadened the scope of the FCLAA's preemption and, in certain cases, the broader language indicates greater preemption under the 1969 Act than under the 1965 Act. *See Cipollone*, 505 U.S. at 520. Nevertheless, as a unanimous Supreme Court has cautioned in a similar preemption context, *see New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S.

645, 656 (1995), we must be careful not to adopt an "uncritical literalism" in approaching this difficult issue. Instead, we must follow the instruction of the Supreme Court that "any understanding of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.' " *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (quoting *Cipollone*, 505 U.S. at 530 n.27) (emphasis in original).[2] In *Travelers Insurance*, the Court considered § 514 of the Employee Retirement Income Security Act ("ERISA"). A unanimous opinion of the Court stated:

> The governing text of ERISA is clearly expansive. Section 514(a) marks for pre-emption "all state laws insofar as they . . . relate to any employee benefit plan" covered by ERISA, and one might be excused for wondering, at first blush, whether the words of limitation ("insofar as they . . . relate") do much limiting. If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere," H. James, Roderick Hudson xli (New York ed., World's Classics 1960). But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. . . . We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

Travelers Ins., 514 U.S. at 655-56.

The limiting language of the FCLAA at issue here ("with respect to advertising and promotion") is similar in its breadth

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[2] Although the lead opinion in *Medtronic* did not carry a majority of the Court, a majority of the Court did agree with the general principles at issue here.

to the language of ERISA § 514 ("relate to any employee benefits plan"). *See Vango Media, Inc. v. City of New York*, 34 F.3d 68, 74 (2d Cir. 1994). Despite the obvious difference in the statutes, the methodology set out in *Travelers Insurance* is helpful in interpreting the language of the FCLAA at issue here. If the FCLAA language ("with respect to advertising and promotion") were viewed with an "uncritical literalism," the effect would be to "read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *Travelers Ins.*, 514 U.S. at 656.

Following the Supreme Court's mandate in *Travelers Insurance* and in *Medtronic*, we must examine the congressional scheme and legislative history of § 5(b) in order to determine what Congress meant by this broad language. *See id.* (interpreting "relate to" under ERISA § 514 in accordance with the congressional goal of uniformity under ERISA); *Medtronic*, 518 U.S. at 484-85. In *Cipollone*, the Court stated that "the pre-preemptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." 505 U.S. at 517. Notably, however, every opinion in *Cipollone* nevertheless relied on legislative history, historical context, legislative purpose, or analysis of the statutory provisions as a whole in interpreting the scope of the pre-emption mandated by the language of § 5(b) of the 1969 Act. *See id.* at 513-15, 519-20, 529 (plurality opinion); *id.* at 534-35, 539-42 (Blackmun, J., concurring in part and dissenting in part); id. at 553 (Scalia, J., concurring in part and dissenting in part). Indeed, in *Medtronic*, a majority of the Court took pains to clarify what it meant in *Cipollone*:

> As in *Cipollone*, we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. While the pre-emptive language of [the statute at issue in *Medtronic*] means that we need not go beyond that language to determine whether Congress intended the [statute] to pre-empt at least some state law, we must nonetheless "identify the domain expressly pre-empted"

> by that language. Although our analysis of the scope of the pre-emption statute must begin with its text, our interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption.

Medtronic, 518 U.S. at 484-85 (quoting *Cipollone*, 505 U.S. at 517) (citations omitted). The Court went on to discuss those two presumptions. First, it noted that, "because the States are independent sovereigns in our federal system," there has long been a presumption that "Congress does not cavalierly pre-empt state-law causes of action." *Id.* at 485. This presumption, remarked the Court, is especially applicable when Congress legislates in areas traditionally occupied by the historic police powers of the state. Second, continued the Court, in determining whether Congress has preempted such activity, the purpose of Congress must, in every case, be "the ultimate touchstone." *Id.* (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)). That intent is discerned, continued the Court, from the language of the Act, the statutory framework and the structure and purpose of the Act as a whole. *See id.* at 486. In light of the Supreme Court's clear mandate, we cannot limit our analysis solely to the language of § 5(b). Indeed, the only other circuit to confront whether the FCLAA preempts a similar ordinance has heeded the Supreme Court's words and adopted the methodology set forth in the Court's opinions. *See Penn Adver. of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1324 (4th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 1030 (1996), *readopted*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

Any other approach leads to results that we cannot believe Congress intended.[3] We cannot imagine that Congress

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[3] We need not hypothesize such results; adherence to a more rigid approach already has produced them. One court has held that the FCLAA prevents states and municipalities from restricting both advertisements of cigarettes near schools and distributions of free cigarette samples. *See Rockwood v. City of Burlington*, 21 F. Supp.2d 411, 420 (D. Vt. 1998).

intended the states to be without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard. However, failure to remember that Congress was concerned about the states' capacity to utilize their traditional police powers on matters that do not tread on federal interests inevitably will lead to such results. We can expect Congress to be far more explicit if it intends to dilute this residual authority of the states.

When we examine the FCLAA in light of congressional goals, we encounter two important manifestations of congressional intent that shed light on the scope of § 5(b) preemption in this case. The first does not require that we leave the text of the statute. Congress set forth, in the statutory text, an express statement of the purpose of the FCLAA and its preemptive provisions:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) *not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.*

15 U.S.C. § 1331 (emphasis added). Moreover, the legislative history confirms that the preemption provision was adopted "to avoid the chaos created by multiplicity of conflicting regulations." S. Rep. No. 566, 1970 U.S.C.C.A.N. at 2663.

The second indication of the congressional intent confirms the message of this statutory text by indicating that Congress, in enacting the statute, was aware of the presumption against preemption and concerned about preserving areas of traditional local concern. The Senate Report refers to § 5(b) as "narrowly phrased" and not intended to touch state authority over sales to minors, taxation, indoor smoking, or "similar police regulations." S. Rep. No. 566, 91st Cong., 2d Sess. (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663. We therefore must read the language of the FCLAA preemption provision in light of Congress' desire not only to ensure uniformity of regulation with respect to matters of labeling and advertising, but also in light of the manifest congressional concern in preserving for the states the remainder of their traditional police powers.

B.

We turn then to the Ordinance to determine whether it is the type of police power regulation of local concern that Congress intended to preserve. *See* S. Rep. No. 566, 1970 U.S.C.C.A.N. at 2663. When the Ordinance is read in its entirety, it is clear that its thrust is the restriction of public advertisement of cigarettes (and alcohol products) in various locations. The Ordinance bans all public advertisement of such products, but then exempts certain sign types in certain locations. The Ordinance exempts signs located near highways, signs in certain commercial and manufacturing zoning areas, signs at certain sports facilities, signs inside a store that is licensed to sell alcohol and cigarette products, signs on commercial vehicles transporting such products, and signs identifying the premises upon which such products are sold.

Land-use and zoning issues have " 'always been an intensely local area of the law.' " *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 67 (4th Cir. 1992) (quoting Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L.

Rev. 837, 839 (1983)) (tracing the history of land-use and zoning regulations in the United States); *see also River Park, Inc. v. City of Highland Park*, 28 F.3d 164, 165, 167 (7th Cir. 1994); *Muckway v. Craft*, 789 F.2d 517, 523 (7th Cir. 1986). More specifically, it has been established for quite some time that zoning restrictions on the sizes and placement of outdoor advertisements are well within the police power of states and municipalities.[4] *See St. Louis Poster Adver. Co. v. City of St. Louis*, 249 U.S. 269, 274-76 (1919); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 529-31 (1917). Indeed, the Supreme Court has held that a Utah statute banning the outdoor advertisement of cigarettes is within that power. *See Packer Corp. v. Utah*, 285 U.S. 105, 108-10 (1932). The placement and manner of outdoor advertising is a matter of traditional local concern. Although Congress could choose to preempt such police regulations, it has indicated that it does not wish to do so under the FCLAA. *See Penn Advertising*, 63 F.3d at 1324; S. Rep. No. 566, 1970 U.S.C.C.A.N. at 2663. In short, considering Congress' express intent to preserve traditional areas of local concern not implicated by its desire for uniformity in advertising and labeling, we ought not imply, especially in light of the presumption against preemption, such an abrogation of a regulation of local interest and importance.

Our conclusion that this Ordinance is within the traditional local police power that Congress wished to preserve cannot end our inquiry. We still must examine the effect of the Ordinance on the federal interest in uniformity of labeling and advertising regulations. This inquiry requires that we focus on the precise sort of regulation that the Ordinance requires and determine whether compliance with the Ordinance will frustrate or burden the purpose of the federal statute. The

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[4] This authority is subject, of course, to the First Amendment protection of such signs. *See generally 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). We express no opinion with respect to the First Amendment challenge to the Ordinance, which the district court must address on remand.

Ordinance basically is a land-use regulation; it regulates the location and type of signs. In that respect, it creates no danger of interfering with the FCLAA's advertising and labeling requirements. *See Penn Advertising*, 63 F.3d at 1324.[5]

We do believe, however, that one aspect of the Ordinance is problematic in this regard. In addition to its many provisions regulating land-use, the Ordinance also purports to regulate the content of some advertising without regard to any land-use consideration. Specifically, the Ordinance permits advertising, without any location consideration, that is limited to a generic, as opposed to brand-specific, mention of a tobacco product. In our view, this provision, unlike the rest of the Ordinance, runs squarely into the prohibition of the current § 5(b), a provision that, we must remember, is substantially broader than its predecessor, which dealt solely with the specific labeling requirements.

Although we find this one aspect of the Ordinance to be preempted by federal law, we think it is clear that this aspect is severable from the rest of the Ordinance. We think it is clear that the City Council, intending to enact a broad land-use provision, would not have regarded the problematic provision as a necessary component of its handiwork. The Supreme Court of Illinois has recently noted, in considering a severability issue, that the courts have an "obligation to uphold legislative enactments whenever reasonably possible."

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[5] In this respect, the Ordinance here marks a sharp contrast with the ordinance in *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994). In *Vango Media*, the court considered whether an Ordinance requiring a minimum of one public health message for every four cigarette advertisements on city-licensed facilities was preempted by the FCLAA. The court held that the regulation was "with respect to advertising and promotion of cigarettes," and therefore preempted. In reaching this conclusion, the court noted that the regulation would create the nonuniformity that Congress feared. *See id.* at 74. There, unlike here, the local law would require that certain anti-smoking messages be carried in cigarette advertisements, thereby directly conflicting with the advertisement message requirements contained in the FCLAA and creating nonuniformity with those provisions.

People v. Sanders, 696 N.E.2d 1144, 1149 (Ill. 1998). That court has explained the test for severability:

> [T]his court has long held that the test of severability is whether the valid and invalid provisions of the Act are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently . . . .

Cincinnati Ins. Co. v. Chapman, 691 N.E.2d 374, 382 (Ill. 1998) (quoting *Fiorito v. Jones*, 236 N.E.2d 698 (Ill. 1968)) (internal quotation marks omitted). We believe that it is "reasonably possible" to sever the provision in question because severability would not hinder the goal of the Ordinance, which is to restrict the advertisement of cigarettes and alcohol. We cannot say that the Council would not have passed the Ordinance without this minor provision.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed in part and reversed and remanded in part for further proceedings consistent with this opinion. The City is entitled to its costs in this appeal.

AFFIRMED in part and
REVERSED and REMANDED in part.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35416
D.C. No. CV-97-05076-RJB
OPINION

JAMES R. LINDSEY; SUN CHA LINDSEY, and and their marital community,

Plaintiffs-Appellants,

MBA, INC., a Washington corporation; F I T S, LLC, a Washington limited liability corporation; SAN JUNG CORPORATION, a Washington corporation,

Plaintiffs,

—v.—

TACOMA-PIERCE COUNTY HEALTH DEPARTMENT, a combined City-County Health Department; its Board of Health; TACOMA-PIERCE COUNTY BOARD OF HEALTH; FEDERICO CRUZ-URIBE, Director of Health for the Tacoma-Pierce County Health Department in his official capacity; BRIAN EBERSOLE, in his official capacity; FRANCEA MCNAIR, in her official capacity; WENDELL BROWN, in his official capacity; KAREN BISKEY, in her official capacity; LEONARD E. SANDERSON, in his official capacity; DAVID SPARLING, in his official capacity; ROBERT W. EVANS, in his official capacity,

Defendants-Appellees,

—and—

COUNTY OF PIERCE; CITY OF TACOMA, a municipal corporation,

Defendants.

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
August 11, 1999—Seattle, Washington
Filed November 19, 1999

Before: William C. Canby, Jr., Melvin Brunetti,
and Diarmuid F. O'Scannlain, *Circuit Judges*.

Opinion by Judge Brunetti

COUNSEL

Floyd Abrams, Cahill Gordon & Reindel, New York, New York, for the plaintiffs-appellants.

Clifford D. Allo, Tacoma-Pierce City Health Department, Tacoma, Washington, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

In 1996, the Tacoma-Pierce County Health Department Board of Health adopted a resolution that bans outdoor tobacco advertising within Pierce County, Washington. The Board adopted the ban in an attempt to reduce underage tobacco use in the county. The Lindseys, owners of convenience stores who are licensed to sell tobacco products in the State of Washington, filed this action against the Board of Health and other defendants alleging that the Board's resolution was (1) an unconstitutional regulation of commercial speech under the First Amendment; (2) preempted by the Fed-

eral Cigarette Labeling and Advertising Act; (3) preempted by the Washington Tobacco Access to Minors Act; and (4) beyond the Board's statutory authority. The district court granted the Board's motion for summary judgment and entered a judgment in its favor. The Lindseys appeal from the district court's final judgment in favor of the Board. We have jurisdiction under 28 U.S.C. § 1291 and reverse because a local ban on outdoor tobacco advertising is preempted by the Federal Cigarette Labeling and Advertising Act.

I.

James Lindsey and Sun Cha Lindsey—plaintiffs-appellants—are husband and wife and the owners of neighborhood convenience stores located in Tacoma, Washington. The Lindseys hold a cigarette retailers' license issued by the State of Washington and sell cigarettes and other tobacco products at their stores. Prior to March 1, 1997, the Lindseys displayed tobacco advertisements inside and outside their stores and received compensation from tobacco companies based on the volume of their tobacco sales, their participation in promotional programs, and their utilization of brand advertisements. On March 1, 1997, the Tacoma-Pierce County Health Department Board of Health's Resolution No. 96-1997 went into effect banning all "outdoor advertising of tobacco and tobacco products . . . within the jurisdiction of the Tacoma-Pierce County Health Department Board of Health." As a result of the Board's resolution, the Lindseys were forced to discontinue their use of outdoor tobacco advertisements.

The Tacoma-Pierce County Health Department Board of Health ("Board")—defendant-appellee—is a combined city-county health department created by the City of Tacoma and Pierce County. Under the Washington Revised Code, the Board has the authority to "[e]nact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof." Wash. Rev. Code § 70.05.060. Pursuant to this

authority, the Board adopted Resolution No. 96-1997, the Truth in Outdoor Tobacco Advertising Regulation ("Resolution"), on December 4, 1996, banning outdoor tobacco advertising in Pierce County.

The Board justified its adoption of the Resolution based on its findings that "[t]obacco advertising, whether intended to promote tobacco use or only compete for market share, has the consequence of promoting tobacco use" and that "[t]obacco advertising induces children to initiate tobacco use." The Board specifically targeted all outdoor tobacco advertisements because it believed that outdoor advertisements intrude into public spaces and induce minors to use tobacco. The Board, therefore, banned all tobacco advertisements that can be seen from the street unless the advertisements are presented in a tombstone format.

Under the Resolution's tombstone exception, licensed tobacco retailers can post price and availability information outside their businesses so long as the advertisements are in plain black type on a white field without adornment, color, opinion, artwork, or logos. The Resolution does not otherwise regulate the content of tobacco advertisements. No tombstone advertisement can be displayed, however, if it is visible from a school, school bus stop, bus stop, or sidewalk regularly used by minors to get to school or within one thousand feet of a school, playground, or public park. The Resolution does not regulate tobacco advertisements located inside retail establishments unless the advertisements can be seen from the street. A retailer who violates the Resolution can be fined one hundred dollars per day for each advertisement that violates the regulation.

The Lindseys filed this action against the Board and various other defendants alleging that the Resolution is invalid because it is: (1) preempted by the Federal Cigarette Labeling and Advertising Act; (2) an unconstitutional regulation of commercial speech under the First Amendment of the United States Constitution; (3) preempted by Washington's Tobacco Access to Minors Act; and (4) an impermissible exercise of

legislative authority beyond the Board's statutory authority. The Lindseys and the Board filed cross-motions for summary judgment and partial summary judgment on the federal preemption, state preemption, and scope of authority claims. The district court, in a published order, denied the Lindseys' motion for summary judgment, granted the Board's motion for partial summary judgment, and dismissed the Lindseys' federal preemption, state preemption, and scope of authority claims. *See Lindsey v. Tacoma-Pierce County Health Dep't*, 8 F. Supp. 2d 1213 (W.D. Wash. 1997). The district court reasoned that: (1) the Resolution was not preempted by the Federal Cigarette Labeling and Advertising Act because the Resolution only regulates the location and not the content of cigarette advertisements; (2) the Resolution was not preempted by state law because the Resolution does not directly regulate indoor advertising; and (3) the Board did not exceed its authority when it adopted the Resolution because the Resolution is reasonably related to the Board's authority to enact regulations that promote and improve public health.

The Lindseys and the Board subsequently filed another round of summary judgment motions on the Lindseys' First Amendment claim. The district court, in another published order, denied the Lindseys' motion, granted the Board's motion, and dismissed the Lindseys' First Amendment claim concluding that the Resolution was a constitutional regulation of commercial speech under *Central Hudson*. *See Lindsey v. Tacoma-Pierce County Health Dep't*, 8 F. Supp. 2d 1225, 1226 (W.D. Wash. 1998). The district court reasoned that the Resolution was constitutional because it was sufficiently related to its purpose of reducing underage tobacco use and because non-speech alternatives to the regulation did not exist. The Lindseys appeal from the district court's final judgment entered in favor of the Board. We have jurisdiction under 28 U.S.C. § 1291 and now reverse.

II.

We review a grant of summary judgment de novo. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Margolis*, 140 F.3d at 852; *Bagdadi*, 84 F.3d at 1197. In regard to the relevant substantive law at issue in this case, a district court's decision regarding federal preemption is reviewed de novo, *see Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998), as is a district court's interpretation and construction of a federal statute. *See Alexander v. Glickman*, 139 F.3d 733, 735 (9th Cir. 1998); *Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1428 (9th Cir. 1998).

III.

Under the Supremacy Clause of the United States Constitution, the laws of the United States are "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Issues of federal preemption arising under the Supremacy Clause, however, "start with the assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Congressional intent is, therefore, the " 'ultimate touchstone' of preemption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

Federal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law actu-

ally conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in the legislative field. *See Cipollone*, 505 U.S. at 516. When, however, Congress considers the issue of preemption and adopts a preemption statute that provides a reliable indication of its intent regarding preemption, the scope of federal preemption is determined by the preemption statute and not by the substantive provisions of the legislation. *See id.* at 517. The reason is that "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.* Because Congress adopted an explicit preemption statute when it enacted the Federal Cigarette Labeling and Advertising Act ("FCLAA") that provides a reliable indication of Congress' intent regarding preemption, the federal preemption issue in this case is "governed entirely by the express language" of the FCLAA's preemption statute. *Cipollone*, 505 U.S. at 517.

A.

After a Surgeon General's advisory committee reported in 1964 that cigarette smoking is a health hazard, the Federal Trade Commission ("FTC") promulgated a trade regulation that would have required tobacco companies " 'to disclose, clearly and prominently, in all advertising and on every pack, box, carton, or container of cigarettes that cigarette smoking is dangerous to health and may cause death from cancer and other diseases.' " *Cipollone*, 505 U.S. at 513 (quoting 29 Fed. Reg. 8325 (1964)). In addition to the FTC, a number of states also acted in response to the advisory committee's report and considered regulating the labeling and advertising of cigarettes. *See id.* With the prospect of diverse, nonuniform, and confusing cigarette labeling and advertising regulations looming over the tobacco industry, Congress enacted the FCLAA in 1965 to adequately inform the public about the health hazards of smoking and to protect the national econ-

omy from the burdens of diverse regulations related to cigarette advertising and labeling. *See id.* at 514; *see also* 15 U.S.C. § 1331.

To inform the public about the possible dangers of smoking, the FCLAA required that all cigarette packages contain a conspicuous warning label stating: "Caution: Cigarette Smoking May Be Hazardous To Your Health." *Cipollone*, 505 U.S. at 514 (internal quotations omitted). To prevent diverse regulations, the FCLAA preempted advertising and labeling regulations related to smoking and health. The FCLAA's preemption provisions provided:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Id. at 514. The FCLAA also contained a termination provision which stated that the FCLAA's advertising regulations would terminate on July 1, 1969. *See id.*

As July 1, 1969, approached, the FTC, Federal Communications Commission, and several states again contemplated the regulation of tobacco advertising and labeling. For the same reasons that Congress originally adopted the FCLAA in 1965, Congress amended the FCLAA by enacting the Public Health Cigarette Smoking Act of 1969 ("PHCSA"). The PHCSA, in relevant part, expanded the scope of the FCLAA's preemption provisions. Since the adoption of the PHCSA in 1969, the FCLAA's preemption statutes have provided:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to

> the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334.

The plain language of the FCLAA preempts any state law that imposes a requirement or prohibition based on smoking and health with respect to cigarette advertising. *See Cipollone*, 505 U.S. at 523-24; *see also Vango Media, Inc. v. City of New York*, 34 F.3d 68, 72 (2d Cir. 1994) ("We need only determine whether the Local Law impose[s] a requirement or prohibition based on smoking and health with respect to the advertising or promotion of any cigarettes.") (internal quotations and ellipses omitted). The Board's resolution banning outdoor tobacco advertising in Pierce County is preempted by the express language of the FCLAA because the resolution imposes a requirement or prohibition based on smoking and health with respect to cigarette advertising.

The Resolution is a requirement or prohibition because the phrase "requirement or prohibition" encompasses positive enactments adopted by political subdivisions, *see Cipollone*, 505 U.S. at 521; *Vango Media*, 34 F.3d at 72-73, and because the Resolution expressly prohibits outdoor tobacco advertising in Pierce County. The Resolution also imposes a requirement on cigarette advertising because it requires availability advertisements to be printed in a legislatively defined tombstone format—"plain black type on a white field without adornment and unaccompanied by color, opinion, artwork, or logos." The Resolution is based on smoking and health because, in the words of the Board, it "pertains to matters of health and safety of the citizens of Pierce County." In fact, the findings which are included in the Resolution to justify the Board's ban on outdoor tobacco advertising almost exclusively refer to the various health risks that are related to cigarette smoking. Finally, the Resolution is a requirement or prohibition with respect to cigarette advertising because the Resolution expressly prohibits outdoor tobacco advertisements and regulates point of sale availability information. The

Resolution is, therefore, preempted by the clear and express language of the FCLAA because it creates a "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(b).

B.

The Board does not contend that the plain language of the FCLAA fails to preempt its ban on outdoor tobacco advertisements. Rather, the Board attempts to evade the express language of the FCLAA's preemption provision by citing to the Fourth Circuit's opinion in *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *affirmed on remand*, 101 F.3d 332 (4th Cir. 1996), and arguing that the FCLAA does not preempt its resolution because the FCLAA only preempts local laws that regulate the content rather than the location of cigarette advertisements. We find the Board's argument and the Fourth Circuit's decision in *Penn Advertising* unpersuasive, and we decline to follow the reasoning of our sister circuit because it ignores the history, purpose, and language of the FCLAA and is not supported by Supreme Court precedent.

Penn Advertising addressed the issue of whether a city ordinance that prohibits the placement of any sign advertising cigarettes in a publicly visible location was preempted by the FCLAA (*see id.* at 1320-21), and concluded that such an ordinance was not preempted by the FCLAA because an ordinance which regulates the location rather than the content of cigarette advertisements is not based on smoking and health. *Penn Advertising* relied on the Supreme Court's decision in *Cipollone* and reasoned that if the FCLAA did not preempt the common law warranty, misrepresentation, fraud, and conspiracy claims filed in *Cipollone*, the FCLAA did not preempt the City of Baltimore's general ban on publicly visible tobacco advertisements.

Penn Advertising misconstrues *Cipollone* when it concludes that content regulations can be distinguished from location regulations under the FCLAA because *Cipollone* does not support such a distinction. In *Cipollone*, the Court had to determine whether state common law actions filed against tobacco companies for failure to warn, breach of warranty, fraudulent misrepresentation, and conspiracy were preempted by the FCLAA. *See Cipollone*, 505 U.S. at 508-09. A plurality of the Court addressed each common law claim individually stating that *"[t]he central inquiry* in each case *is straightforward*: we ask whether the legal duty that is the predicate of the common-law damages action *constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,'* giving that clause a fair but narrow reading." *Id.* at 523-24 (Stevens, J., plurality) (emphasis added). The plurality opinion expressly recognized that the plain language of the FCLAA is determinative to resolving preemption issues regarding tobacco advertising.

The plurality held that failure to warn claims were preempted by the FCLAA to the extent that such claims required a plaintiff to show that tobacco advertisements should have included additional or more clearly stated health warnings. *See id.* at 524-25. The plurality reasoned that such failure to warn claims were preempted because they relied on "a state-law requirement or prohibition . . . with respect to . . . advertising or promotion." *Id.* at 524. The plurality noted, however, that failure to warn claims based on negligent testing and research practices were not preempted by the FCLAA because such claims were unrelated to advertising and promotional practices. *See id.* at 524-25.

The plurality concluded that express warranty claims were not preempted by the FCLAA because liability for express warranty is imposed not under state law but by the warrantor's express actions. *See id.* at 525-27. The plurality also concluded that the FCLAA does not preempt fraudulent misrepresentation claims because fraudulent misrepresentation

claims are based on a state law duty not to deceive rather than a state law duty "based on smoking and health." *See id.* at 528-29. Likewise, the plurality concluded that the FCLAA does not preempt conspiracy to defraud claims because such claims are based on a duty not to conspire to commit fraud rather than a duty "based on smoking and health." *See id.* at 530. The *Cipollone* plurality always examined the plain language of the FCLAA to determine preemption issues and never recognized a distinction between content regulations and other regulations like location regulations. The Board's argument and the Fourth Circuit's conclusion that location regulations are distinguishable from content regulations under the FCLAA are, therefore, not supported by the plurality decision in *Cipollone*.

In two recent cases, the Second and Seventh Circuits held that a ban on outdoor advertising is not preempted by the FCLAA. *See Greater New York Metro. Food Council, Inc. v. Giuliani*, No. 99-7006, 1999 WL 965691, at *6 (2d Cir. Oct. 25, 1999); *Federation of Advertising Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633, 639 (7th Cir. 1999) ("*FAIR*"). Both of these cases draw a distinction between location and content regulations by holding that certain bans on outdoor advertising are not preempted, while finding that a tombstone requirement is preempted.[1]

Recognizing that the text of the FCLAA preemption provision does not support the artificial distinction between content and location restrictions, both decisions turn to the Congressional purpose behind the FCLAA preemption statute

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[1] The tombstone provisions at issue in *Giuliani* and *FAIR* were slightly different, although both tombstone provisions were struck down on the basis that they were content restrictions imposed upon tobacco advertising. *See Giuliani*, 1999 WL 965691, at *6; *FAIR*, 189 F.3d at 640. In *Giuliani*, a tobacco advertiser could place only "a single, black and white, text-only 'tombstone' sign stating, 'TOBACCO PRODUCTS SOLD HERE'" within ten feet of an entrance to a store where tobacco products are sold. *Giuliani*, 1999 WL 965691, at *1. The tombstone provision in *FAIR* allowed only a "generic, as opposed to brand-specific, mention of a tobacco product." *FAIR*, 189 F.3d at 640.

for support. *See Giuliani*, 1999 WL 965691, at *2; *FAIR*, 189 F.3d at 637. Specifically, they recognize that the Congressional purpose behind the FCLAA preemption statute was "an effort to avoid the chaos of multiple diverse regulations" in tobacco advertising. *Giuliani*, 1999 WL 965691, at *4 (quoting *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 70 (2d Cir. 1994)); *see also FAIR*, 189 F.3d at 638. However, both decisions conclude that location restrictions do not lead to the "diverse, nonuniform, and confusing" advertising standards that Congress aimed to prevent by promulgating the FCLAA preemption statute. *See Giuliani*, 1999 WL 965691, at *4; *FAIR*, 189 F.3d at 639.

The distinction between location and content regulations is not only unsupportable by reference to the text, but the Congressional purpose of § 1334(b) supports the preemption of a ban on outdoor tobacco advertising. As noted in *Giuliani*, advertisers are forced to comply with diverse local zoning laws; however, this fact does not justify placing additional restrictions solely on tobacco advertisers. Rather, the failure to preempt location restrictions on tobacco advertising will place an unjustifiable burden upon a tobacco advertiser to consult local regulations concerning the placement of tobacco advertisements in every locality in which it wishes to advertise. The bans on outdoor advertising in *FAIR*, *Giuliani*, and this case present a good example of the multitude of different regulations tobacco advertisers face. The ban in *Giuliani* prevents any tobacco advertising (other than tobacco advertisements on motor vehicles) within a 1000 foot buffer zone around a school building, playground, child day care center, or youth center. *See Giuliani*, 1999 WL 682015, at *1. In contrast, the Chicago ordinance at issue in *FAIR* bans all public advertising of tobacco advertising, but carves out numerous broad exceptions including "signs located near highways, signs in certain commercial and manufacturing zoning areas, signs at certain sports facilities, signs inside a store that is licensed to sell alcohol and cigarette products, signs on commercial vehicles transporting such products, and signs iden-

tifying the premises upon which such products are sold." *FAIR*, 189 F.3d at 639. Finally, the Tacoma-Pierce County regulation in this case constitutes a complete ban on all outdoor advertising, except those advertisements that meet a tombstone exception. Thus, a tobacco advertiser is faced with diverse and nonuniform tobacco advertising regulations depending solely upon the politics of the locality of the advertising. This is precisely the result Congress was trying to avoid in promulgating § 1334(b).

The structure and history of § 1334(b) support our view that a local ban on outdoor advertising is preempted by the FCLAA. Although we recognize that there is some ambiguity in the FCLAA's legislative history, *see Cipollone*, 505 U.S. at 521, the structure and history of the FCLAA do not unambiguously support the positions taken by *Giuliani* and *FAIR*; rather, the structure and history of the FCLAA support preemption and there is no reason to depart from the plain language of § 1334(b). *See Cipollone*, 505 U.S. at 521-22 (" 'We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.' ") (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)); *Vango Media*, 34 F.3d at 73 ("[W]e rely on an express preemption analysis in which focus remains on the language Congress used in § 1334(b).").

The statutory text of the FCLAA is the starting point for preemption analysis under § 1334. *See Cipollone*, 505 U.S. at 521-22; *see also id.* at 532 (Blackmun, J., concurring in part and dissenting in part) ("An interpreting court must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (internal quotation marks omitted); *id.* at 548 (Scalia, J., concurring in part and dissenting in part) ("The proper rule of construction for express preemption provisions is, it seems to me, the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning."). "[T]here is no 'good reason to believe' that Congress meant less than what it said;

indeed, in light of the narrowness of the 1965 Act, there is 'good reason to believe' that Congress meant precisely what it said in amending that Act." *Id.* at 522. The Supreme Court reiterated its emphasis on giving effect to the plain language of statutory text in a recent Medical Device Amendments (MDA) case, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). In *Medtronic*, the Court again stated that "the scope of [a] preemption statute must begin with its text . . . ." *Id.* at 484-85.

Despite the holdings of *Penn Advertising*, *FAIR*, and *Giuliani*, the text of the FCLAA's preemption provision clearly preempts a ban on outdoor advertising because such a ban constitutes a "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(b).

C.

The language, structure, and history of the FCLAA also support the conclusion that location regulations directed at cigarette advertising cannot be distinguished from content regulations under the FCLAA. The original 1965 preemption statute provided: "No *statement* relating to smoking and health shall be required *in the advertising* of any cigarettes . . . ." The current preemption statute provides: "No *requirement or prohibition* based on smoking and health shall be imposed under State law *with respect to the advertising or promotion* of any cigarettes . . . ."

As the plurality in *Cipollone* stated:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply 'statements' but rather 'requirements or prohibitions imposed under State law.' Second, the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes.

Cipollone, 505 U.S. at 520. To give effect to the 1969 amendments, the distinction between content regulations and location regulations cannot now be sustained because the 1965 statute only preempted content regulations and the 1969 amendments broadened the scope of preemption beyond state laws that regulated only the content of tobacco advertisements. *See id.* at 519-20 ("[T]he 1965 Act only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements.").

The impact of the 1969 amendments on the FCLAA's preemptive scope is further demonstrated by an examination of the FCLAA's other preemption provision. The FCLAA's first preemption provision was not amended in 1969 and still provides that "[n]o *statement* relating to smoking and health . . . shall be required *on* any cigarette package." 15 U.S.C. § 1334(a) (emphasis added). The second preemption provision is at issue in this case and provides that "no *requirement or prohibition* based on smoking and health shall be imposed . . . *with respect* to the advertising or promotion of . . . cigarettes." 15 U.S.C. § 1334(b) (emphasis added).

In order to distinguish the language currently used in § 1334(a) from the language currently used in § 1334(b), § 1334(b) must be read as preempting more than just content regulations. The language used in § 1334(a) is focused on content regulations because it narrowly preempts statements related to smoking and health on cigarette packages, but the language of § 1334(b) is not focused on content because it broadly preempts requirements and prohibitions based on smoking and health with respect to advertisements. If we were to accept the Board's content-location distinction we would be forced to give "requirement or prohibition" in subsection (b) essentially the same meaning as "statement" in subsection (a), thereby ignoring the basic principle of statutory construction that different words in the same statute must be given different meanings. *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a

whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.") (citing Sutherland Stat. Const. §§ 46.05, 46.06 (4th ed. 1984)). Accordingly, the language, history, and structure of § 1334(b) demonstrate, contrary to the Board's position, that the FCLAA and § 1334(b) preempt more than just regulations affecting the content of cigarette advertisements.

D.

Finally, the conclusion that the Resolution is preempted by the FCLAA advances the legislative policies that underlie the federal act. When Congress enacted the FCLAA it declared:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> . . .
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331. If every board of health, city, county, and state in this country regulated the location of tobacco advertisements and prescribed certain tombstone formats for availability information signs like the Board has in this case, the purpose of the FCLAA would be frustrated because the national economy would be impeded by diverse, nonuniform, and confusing cigarette advertising regulations. The conclusion that the Resolution is preempted by the FCLAA is, therefore, not only mandated by the language of the statute but

also consistent with the legislative goals that spawned the FCLAA's enactment in 1965 and subsequent expansion in 1969.

IV.

In a final effort to save its resolution from preemption, the Board asserts two arguments that are unrelated to the language or purpose of the FCLAA. First, the Board argues that state and local governments can regulate and ban outdoor tobacco advertising under *Packer Corp. v. Utah*, 285 U.S. 105 (1932). Second, the Board argues that Congress exceeded its authority under the commerce clause when it preempted local regulation of wholly intrastate tobacco advertising. These final arguments are meritless.

Although the Court in *Packer* upheld Utah's statewide ban on outdoor tobacco advertising, *Packer* is inapplicable to this case because it pre-dates the enactment of the FCLAA and addresses issues irrelevant to this appeal. The specific issues in *Packer* were whether a statewide ban on outdoor tobacco advertisements that left print advertisements unregulated violated the equal protection clause by creating an arbitrary classification, impermissibly took advertisers' property without due process of law by limiting the freedom of contract, or constituted an impermissible state regulation of interstate commerce. *See Packer*, 285 U.S. at 109-12. *Packer* does not address or limit Congress' power to preempt local regulation of tobacco advertising or stand for the broad proposition that local governments have an inherent and undeniable right to regulate tobacco advertising. *Packer* simply instructs that in the *absence of federal regulations*, local governments can regulate tobacco advertising in general and ban outdoor tobacco advertising in particular.

The Board's argument that Congress cannot preempt local regulation of tobacco advertising that is wholly intrastate under the commerce clause is also meritless because Congress can regulate activities that are wholly intrastate if the activ-

ities have a substantial effect on interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 555-56 (1995). It is beyond dispute that intrastate tobacco advertising has a substantial effect on interstate commerce because, as the Board itself recognizes, the tobacco industry spends nearly $5 billion annually on marketing campaigns. Congress was, therefore, well within its powers under the commerce clause when it enacted the FCLAA's preemption provisions.

V.

Because the Resolution is a requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes and because content regulations are indistinguishable from location regulations under the language and purpose of the FCLAA, the district court erred when it concluded that the FCLAA does not preempt the Resolution. We, therefore, reverse the district court's judgment in favor of the Board, hold that the Resolution is preempted by the FCLAA, and grant the Lindseys' motion for summary judgment on their federal preemption claim. Because the Resolution is preempted by the FCLAA, we decline to address the remaining issues raised on appeal.

REVERSED.

(2)

Supreme Court, U.S.
FILED
MAR 10 2000

No. 99-1171

IN THE
SUPREME COURT OF THE UNITED STATES

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., THE ADVERTISING FREEDOM COALITION, and THE ADVERTISING CLUB OF NEW YORK, INC.,

Petitioners,

-v.-

RUDOLPH W. GIULIANI, in his official capacity as Mayor of the City of New York, THE CITY OF NEW YORK, GASTON SILVA, in his official capacity as Commissioner of the New York City Department of Buildings, and ALFRED C. CERULLO, III, in his official capacity as Commissioner of the New York City Department of Finance,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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March 10, 2000

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COUNTER-QUESTION PRESENTED

Are the provisions of the City of New York's Youth Protection against Tobacco Advertising and Promotion Act, which restrict the location of outdoor and publicly-visible tobacco advertisements away from areas where minor children congregate, preempted under 15 U.S.C. § 1334(b) of the Federal Cigarette Labeling and Advertising Act?

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No. 99-1171

IN THE
SUPREME COURT OF THE UNITED STATES

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., THE ADVERTISING FREEDOM COALITION, and THE ADVERTISING CLUB OF NEW YORK, INC.,

Petitioners,

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Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Respondents, Mayor Rudolph W. Giuliani, *et al.* ("respondents"), respectfully request that this Court deny the petition by petitioners, the Greater New York Metropolitan Food Council, Inc., the Advertising Freedom Coalition, and the Advertising Club of New York, Inc. ("petitioners"), for a writ of certiorari to review the judgment and opinion of the United States Court of

Appeals for the Second Circuit, entered October 25, 1999 (1a-20a). The opinion is reported at 195 F.3d 100 (2d Cir. 1999).

The Second Circuit affirmed in part and reversed in part a judgment of the U.S. District Court for the Southern District of New York (Batts, J.), entered December 18, 1998 (21a-40a). The Circuit Court reversed, with one small exception, the District Court's granting summary judgment to petitioners and entering a permanent injunction against defendants from enforcing the City of New York's Local Law 3 of 1998, the Youth Protection against Tobacco Advertising and Promotion Act ("the Youth Protection Act"). The Circuit held that the District Court erred in finding that the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. §1331 *et seq.*, preempted the Youth Protection Act. The Circuit Court remanded the case to the District Court for further proceedings.

This Court should deny review. There is ample agreement among a majority of Circuits, the Second, Fourth and Seventh, that local laws such as the City's are not preempted under the FCLAA. Furthermore, the present application is premature, because the single claimed conflict with the Ninth Circuit is not yet resolved given that that Court is considering rehearing the case *en banc*. In addition, there is no final judgment in the instant case which has yet to be resolved with respect to the claimed First Amendment violation. Finally, the decision is correct and in accord with this Court's precedent.

The Youth Protection Against Tobacco Advertising and Promotion Act

On December 17, 1997, the New York City Council passed the Youth Protection Act (A1405). The Act amended Title 27 of the New York City Administrative

Code ("Admin. Code"), by adding Article 17-A which is codified at § 27-508.1 *et seq.* (41a-47a).

In relevant part, the Youth Protection Act restricts outdoor tobacco product advertisements (other than those on moving vehicles) within 1000 feet of various locations where children congregate, *i.e.*, any school building, playground, child day care center, amusement arcade or youth center (44a). It also restricts such advertisements in those same areas, when such advertisements are publicly-visible from the street, *i.e.*, within five feet of any exterior window or any door which is used for entry or egress by the public to the building or structure (45a). However, such tobacco product advertisements may be placed or maintained in the interior of any such premises where such advertisements are (i) parallel to the street and face inward, or (ii) affixed to a wall panel or similar structure that is perpendicular to the street regardless of whether such advertisements are illuminated or not illuminated (45a).

Section 1 of the Act contains the Council's comprehensive "Declaration of legislative findings and intent" (A1393-97).[1] The Council finds that certain tobacco product manufacturers have admitted engaging in "strategies designed to advertise and promote tobacco products to minors" and further that "such strategies undermine state and local laws prohibiting the sale or distribution of tobacco products to minors" (A1393). The Council also finds that exposure of minors to such tobacco product advertising and promotion may be constitutionally-restricted through "reasonable targeted limitations on the advertising of such products near schools and other locations where children tend to congregate" (A1393).

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[1] Numbers in parentheses preceded by the letter "A __" refer to pages of the Joint Appendix on Appeal in the Circuit.

The Declaration includes data establishing a dramatic increase in teenage smoking, citing statistics gathered by the federal Centers for Disease Control and Prevention ("CDC") demonstrating that, although the rate of smoking among adults decreased by 50% between 1971 and 1993, the rate of smoking among all high school students increased by over 26% from 1991 to 1996 (A1393). The Council notes that this dramatic increase in teenage smoking occurred even while all the states have had prohibitions in effect on the sale or distribution of cigarettes and other tobacco products to minors and despite a voluntary industry code to prohibit tobacco advertisements that appeal to minors (A1393-94).

The Council emphasizes that studies demonstrate that "nearly 90% of all smokers begin to smoke prior to the age of 18 and that the average child smoker starts daily smoking by the age of 14" (A1394). The Council's findings also note that in New York City, as reported by the Department of Consumer Affairs, 200 children begin to smoke every day (A1393-94).

The Council reviews the City's efforts to enforce local and State laws against sales of tobacco products to children, including: N.Y.C. Admin. Code, § 17-620, which forbids the sale of tobacco products to minors and requires the showing of identification by buyers unless they reasonably appear to be at least 25-years old; N.Y. Public Health Law, § 1399-cc (essentially identical to § 17-620); and N.Y. Penal Law, § 260.21(3), which provides that selling tobacco in any form to a child under age 18 is a crime (A1393-95, A742).

In particular, the Council summarizes the results of its thorough 1995 investigative report entitled *Easy Access*, concerning the wide accessibility of cigarettes to minors in the City (A1394, A825-67). Led by the Department of Consumer Affairs, the enforcement efforts against tobacco

product retailers who violated the law by selling tobacco products to minors, included citywide sweeps, issuance of numerous violations to repeat violators, and the suspension of licenses of those retailers who illegally sold tobacco products to minors three times (*id.*). Notwithstanding, numerous stores continued to violate these laws (A1394-95).

The Council underscores the major role played by tobacco advertising and promotion in tobacco use by minors, citing various studies from the Journal of the American Medical Association ("JAMA"), reports of the National Institute of Medicine and the CDC finding that advertising and promotion "...increase tobacco use by youths...." (A1394-95). For example, a 1992 JAMA article entitled *Brand Logo Recognition by Children Aged 3 to 6 Years* "demonstrated that 30 percent of the three year olds and 91 percent of the six year olds surveyed could correctly match the Joe Camel cartoon trademark with Camel cigarettes" (A1394, A983-88). A 1991 JAMA article estimated that "illegal sales of Camel cigarettes to minors rose from $6 million per year before the advent of Joe Camel in 1988 to $476 million by the end of 1991," with 1/4 of all Camel sales in 1991 to minors (A1394; A934-39; *see* A748-50; A898-1051). The record before the Council included substantial evidence that the percentage of young people below age 18 who smoke is increasing, particularly in the minority community, both nationwide and in the City (A1394, A997-1017).

At several hearings held by the Council's Committees on Youth Services and Health, numerous people testified, including students, teachers, parents, public officials, representatives of anti-tobacco and health organizations, doctors, advertisers, store owners, and legal scholars (A753-54; A1412-2395). There was also ample testimony and reports from experts, newspaper and

scientific journal articles, and other written submissions, which provided compelling data that advertising of tobacco products has played a significant role in teenage tobacco use and smoking patterns and that there is a pervasive presence of tobacco advertising, obviously targeting youth, in the community (*id.*)

The Council's Declaration points to recent revelations from tobacco product manufacturers, including a Liggett & Myers statement that "Liggett acknowledges that the tobacco industry markets to 'youth,' which means those under 18 years of age...." (A1395). It also cites the 1996 Food and Drug Administration ("FDA") rules on advertising and promotion of tobacco, which observed that "the images typically associated with advertising and promotion convey the message that tobacco use is a desirable, socially approved, safe and healthful, and widely practiced behavior among young adults, whom children and youths want to emulate" (A1395, A751, A1018-47). The Council notes that the FDA stated that its rules "do not . . . reflect a judgment that more stringent State or local requirements are inappropriate" (A1395).[2]

In view of all the evidence "that cigarettes are advertised and promoted to minors and that smoking by minors continues to dramatically increase despite laws banning the sale or distribution of tobacco products to minors," the Council finds that "affirmative, reasonable and constitutionally permissible restrictions on tobacco product advertising and promotion may and must be enacted" (A1395-96). The Council noted that Baltimore's similar

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[2] The specific administrative authority of the FDA to act and issue such rules has been rejected. *Brown & Williamson Tobacco Corp. v. Food and Drug Administration*, 153 F.3d 155 (4th Cir. 1998), *cert. granted*, 119 S.Ct. 1495 (1999) (argued Dec. 1, 1999).

ordinance was upheld by the Fourth Circuit in *Penn Advertising, Inc. of Baltimore v. Mayor*, 63 F.3d 1318 (4th Cir. 1995), *vac. and remanded*, 518 U.S. 1030 (1996), *aff'd*, 101 F.3d 322 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997) ("*Penn Advertising*") (A1395-96). Elaborating, the Council states (A1395-96):

> The purpose of this legislation is to promote enforcement of the aforementioned laws banning the sale or distribution of tobacco products to minors and to thereby protect young people. The Council is cognizant of the necessity of acting within the protections afforded by the First Amendment to the United States Constitution and has, therefore, narrowly tailored the scope and effect of this legislation to impose reasonable time, place and manner restrictions on tobacco advertising aimed at or regularly seen by youth while not directly affecting advertising and promotions directed at adults.

The Declaration concludes that, *inter alia*, the legislation "targets minors who may not legally purchase cigarettes," not adults, and does not completely ban outdoor advertising but rather "restricts the time, place and manner of such advertisements" (A1397).

The Litigation.

On January 14, 1998, petitioners, an association of independent supermarkets and national and local associations of advertisers, filed an amended complaint challenging Article 17-A, the tobacco product advertisement restrictions, alleging that the restrictions on outdoor and publicly-visible advertising violate the First Amendment and the parallel provision in Article I, § 8 of

the New York Constitution (A9-29).[3] The complaint's third count alleges that such restrictions are preempted under the FCLAA, and therefore violate the Supremacy Clause (A27). Petitioners sought declaratory and permanent injunctive relief, as well as attorneys' fees (A28-29).

Petitioners moved for summary judgment and a permanent injunction, arguing that the Youth Protection Act violated their First Amendment rights and that it was preempted by the FCLAA (A40-43). Respondents cross-moved for summary judgment declaring the Act valid (A592-95).

The evidence showed that approximately 80% of the City is available for tobacco product advertising under the Youth Protection Act (A762, A1146-47, A2398-99). However, in some of those areas, there are general zoning restrictions which restrict all outdoor product advertising (A1146-49, A2399), not just tobacco advertising as petitioners imply (Pet. p.3, first full par., last line).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions listed by petitioners, section 1331 of the FCLAA provides as follows:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with

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[3] Petitioners did not challenge the tobacco product promotion provisions of the Act.

> respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

THE DISTRICT COURT OPINION

By decision and order dated December 15, 1998, the District Court granted petitioners' motion for summary judgment and entered a permanent injunction against respondents from enforcing the Youth Protection Act; it thus denied respondents' cross-motion (21a-40a). The Court primarily relied on the Second Circuit's holding in *Vango Media v. City of New York*, 34 F.3d 68 (2d Cir. 1994) ("*Vango Media*"), which dealt with a very different statute requiring placement of certain anti-tobacco advertisements, and disavowed the *Penn Advertising* holding, insofar as the Fourth Circuit found that the FCLAA preemption provision concerned requirements or prohibitions which affect the "content," but not the "location," of tobacco product advertising (32a-34a).

THE COURT OF APPEALS OPINION

By opinion entered October 25, 1999, after reviewing this Court's precedent on the governing preemption principles (7a-8a), the Court of Appeals found that, with the exception of the "tombstone" provision, the FCLAA did not preempt the Youth Protection Act (1a-20a). The Court thus: 1) affirmed the judgment insofar as the District Court held that the "tombstone" provision was preempted by the FCLAA,[4] 2) reversed insofar as the District Court held that the remaining provisions of Article 17-A were preempted, and 3) remanded for further proceedings in the District Court with respect to the First Amendment claim (20a).

With respect to the preemptive scope of the FCLAA, the Court noted that:

> "[r]ead literally, [the preemptive scope of §1334(b)] ... could be misunderstood to preempt every conceivable obligation having a relationship – however evanescent – to the advertising and promotion of cigarettes. But this hyper-literal approach

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[4] The "tombstone" provision had permitted, even in the restricted areas, a single, black-and-white, text-only sign which stated "TOBACCO PRODUCTS SOLD HERE," to be placed within ten feet of an entrance to a store where tobacco products are sold (45a). The Circuit Court found that that provision created an obligation directly pertaining to the nature and content of advertising information which risked the sort of "diverse, nonuniform, and confusing" advertising standards that Congress expressly sought to avoid in 15 U.S.C. § 1331 (12a-15a). Applying New York law, the Court found that the "tombstone" provision was severable from the rest of Article 17-A, which was valid and enforceable (18a-19a).

> would yield results that Congress surely did not intend. To take an absurd example, it could divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there.

(8a).

Recognizing that this Court has "recently cautioned" against "uncritical literalism" when interpreting similarly open-ended language in the express preemption provision of another federal statute, citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 656 (1995), the Second Circuit looked to the language of the preemption provision, its historical context, legislative history and purpose, consonant with its earlier precedent in *Vango Media* (9a-10a). Looking to the two express purposes set forth by Congress with respect to the intended preemptive scope of the FCLAA, set forth in 15 U.S.C. §1331, the Court distinguished the *Vango Media* ordinance, as requiring advertisers to display certain messages about smoking and health (other than those required by the FCLAA), and thus risking creating nonuniformity with Congress's federally mandated warning scheme, in violate of §1331's intent to avoid "diverse, nonuniform, and confusing" advertising standards (11a-12a).

In contrast, citing *Penn Advertising, supra,* and *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999), *pet. for cert. filed,* 68 U.S.L.W. 3480 (Jan. 12, 2000) (No. 99-1172), the Court of Appeals held that the physical placement or location restrictions do not impose obligations "with respect to" advertising as that phrase is used in §1334(b) (15a-18a). The Court emphasized that such restrictions do

not touch upon Congress's "comprehensive Federal program" to control cigarette advertising information (16a). It also found that the restrictions do not burden advertisers with a duty to warn nor impose content and format requirements on advertising information, but, instead, regulate placement of signs in a "manner akin to a run of the mill zoning regulation" (16a).

Furthermore, the advertisers did not show how location restrictions could lead to the sort of "diverse, nonuniform, and confusing" standards that Congress sought to avoid when it enacted §1334(b) (16a-17a). Rather, as the Court stated:

> Divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them. Thus, with or without Article 17-A, a cigarette advertiser will still have to ascertain where it can permissibly advertise in light of diverse local zoning ordinances. And no party suggests that such *zoning* regulations fall within the intended purview of § 1334(b). We see no reason to treat the location restrictions before us any differently.

(17a, italics in original).

The Circuit Court also noted that the presumption against preemption is particularly strong in the instant case, as the challenged provisions both as to placement of outdoor advertising and as to regulations directed to the safety and welfare of children lay "within the heartland of the states' historic police powers" (17a-18a, citations omitted).

The Court declined to rule on the merits of the First Amendment claim, opining that the District Court should have the opportunity to consider the issue in the first instance (19a). Upon such remand, there are currently pending the parties' motion and cross-motion for summary judgment with respect to the claimed First Amendment violation.

REASONS FOR DENYING THE PETITION

CERTIORARI SHOULD BE SHOULD BE DENIED BECAUSE PETITIONERS FAIL TO MEET THE STANDARDS FOR REVIEW BY THIS COURT.

The issue the petition presents does not warrant review by this Court, and certainly not at this time. Accordingly, the petition should be denied.

(1)

With respect to the claimed split among the Circuit Courts (Pet. Pt. I, pp. 8-13), there is ample agreement among three of the four Circuits which have addressed the issue to date, the Second, Fourth and Seventh, that local laws such as the City's are not preempted under the FCLAA. *See, The Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), *pet. for cert. filed*, 68 U.S.L.W. 3480 (Jan. 12, 2000) (No. 99-1171) (1a-20a); *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999), *pet. for cert. filed* (Jan. 12, 2000) (No. 99-1172); *Penn Advertising, supra.*[5]

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[5] In two recent decisions, the District Court of Massachusetts ruled that the State of Massachusetts' law in this area was not preempted by the FCLAA, *Lorillard Tobacco Co. v. Reilly*, 76 F.Supp.2d 124 (D. Mass. 1999), and that it did not violate the

In any event, the present application is premature because the single claimed conflict with the Ninth Circuit is not yet resolved given that that Court is considering rehearing the case *en banc*. *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065 (9th Cir. 1999), *amended*, 2000 U.S. App. LEXIS 1967 (9th Cir. Feb. 14, 2000) (*see* Pet. p. 9, n.3; *see also* discussion in City of Chicago's Brief in Opposition to Petition for a Writ of Certiorari in the *Federation* case).[6]

(2)

In addition, the application should be denied because there is no final judgment in the instant case, which has yet to be resolved with respect to the claimed First Amendment violation. The interlocutory nature of the application warrants denial of the application in order to avoid any potential piecemeal review.

(3)

Finally, notwithstanding petitioners' claims (Pet. Pt. II, pp. 13-17), the application should be denied because the Circuit Court's decision was correct and does not conflict with this Court's plurality decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). As set forth above, the Second Circuit's opinion carefully examined the guiding principles in *Cipollone*, as well as this Court's more recent

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First Amendment. *Lorillard Tobacco Co. v. Reilly*, 2000 U.S. Dist. LEXIS 862 (D. Mass. Jan. 24, 2000), *notices of appeal filed* (Feb. 2000). Upon information obtained from the Massachusetts Attorney General's Office, the appeals are scheduled for argument in the First Circuit on April 7, 2000.

[6] On February 14, 2000, the Ninth Circuit's opinion was amended to add a concurring opinion by Judge O'Scannlain. 2000 U.S. App. LEXIS 1967 (9th Cir. Feb. 14, 2000).

precedent in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995). *See also United States v. Locke*, 2000 U.S. LEXIS 1895 (U.S. March 6, 2000) (reiterating that an "assumption" of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence, and contrasting that situation to cases involving subjects historically regulated by the States).

In this case, the Second Circuit properly applied the long-standing presumption against preemption of historic state and local police powers. Specifically, the Circuit correctly recognized that both the local zoning regulatory powers as to placement of outdoor advertising and as to regulations directed to the safety and welfare of children lay "within the heartland of the states' historic police powers" (17a).

Finally, petitioners' stated conflict fails to recognize that, in *Cipollone*, this Court cited with approval the accompanying Senate Report to the FCLAA. *Id.*, 505 U.S. at 529, n.26. As the Second Circuit pointed out, the legislative history of §1334(b) "suggests that Congress wanted to give ... [police power] regulations a wide berth," given that the Senate Report notes that §1334(b) is "narrowly phrased" and "would in no way affect [local power] with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations*" (18a, citing, S. Rep. No. 91-566, *reprinted in* 1970 U.S.C.C.A.N. 2652, at 2663 (emphasis added by Court)).

Accordingly, based on all of the above, we respectfully urge this Court to deny the petition for a writ of certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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(3)

No. 99-1171

IN THE
Supreme Court of the United States

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., *et al.*,
Petitioners,

v.

RUDOLPH W. GIULIANI, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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20PP

QUESTION PRESENTED

Whether a New York City law that bans throughout the City all outdoor tobacco product advertising and indoor tobacco product advertising visible from the street is preempted under Section 5(b) of the Federal Cigarette Labeling and Advertising Act as a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes."

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 99-1171

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., *et al.*,
Petitioners,

v.

RUDOLPH W. GIULIANI, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a Washington, D.C.-based nonprofit public interest law and policy center with supporters in all 50 states, including many within the City of New York.[1] WLF devotes a substantial

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity, other than WLF, its supporters, and its counsel, made a monetary
(continued...)

portion of its resources to protecting the right of commercial free speech. To that end, WLF has appeared before this Court and numerous other federal and state courts in cases raising commercial speech issues. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

WLF also believes strongly in the importance of preserving the policy of national uniformity embodied in the Federal Cigarette Labeling and Advertising Act ("FCLAA"). That policy significantly reinforces First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict advertising.

WLF filed briefs in this case when it was before the district court and the Second Circuit. WLF is filing this brief with the consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby adopts by reference the Statement of the Case contained in the Petition.

In brief, Petitioners The Greater New York Metropolitan Food Council, Inc., *et al.* ("Greater New York") challenge New York City's "Youth Protection Against Tobacco Advertising and Promotion Act" (the "Ordinance"), which was signed into law in January 1998. The Ordinance prohibits maintaining any tobacco advertisement within 1,000 feet of "any school building, playground, child day

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[1](...continued)
contribution to the preparation or submission of this brief.

care center, amusement arcade or youth center." Administrative Code § 27-508.3(a) and (b). The prohibition covers all outdoor locations as well as most indoor locations visible from the outside. *Id.* The Ordinance effectively prohibits outdoor cigarette advertising in 97% of Manhattan, 93% of the Bronx, 92% of Brooklyn, and similarly large regions of Queens and Staten Island.

Greater New York thereafter filed suit against the Ordinance, asserting that the Ordinance violates the First Amendment by imposing unwarranted speech restrictions and that Congress intended to preempt such laws when it adopted the FCLAA. On December 15, 1998, the U.S. District Court for the Southern District of New York issued an order granting Greater New York's motion for summary judgment and denying Respondents' cross-motion for summary judgment. Petition Appendix ("Pet. App.") 21a-40a. The court held that the FCLAA expressly preempts the Ordinance. *Id.* at 37a. Because of its preemption ruling, the district court declined to reach the free speech issue. *Id.* at 40a.

On appeal, the Second Circuit reversed. Pet. App. 1a-20a. The court held that, with one minor exception, the Ordinance was not preempted by the FCLAA.[2] The court stated that the Ordinance does not "control cigarette

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[2] The court held that the provision of the Ordinance that exempted from restriction small "tombstone" signs stating "TOBACCO PRODUCTS SOLD HERE" (§ 27-508.3(c)) was preempted by the FCLAA. Pet. App. 12a-15a. The court went on to hold that § 27-508.3(c) was severable from the remainder of the Ordinance and thus that the remaining provisions were fully enforceable. *Id.* at 18a-19a. The effect of this ruling was to render the Ordinance more restrictive of commercial speech than as originally enacted.

advertising information" but instead "restrict[s] only the physical placement of tobacco advertising signs in a manner akin to a run of the mill zoning regulation." *Id.* at 16a. While conceding that the preemption provision of the FCLAA, if read literally, could be interpreted to apply to the Ordinance,[3] the court rejected that interpretation because (the court believed) such a "hyper-literal," "crude," and "overly-expansive, literal interpretation" would "yield results that Congress surely did not intend." *Id.* at 8a, 9a.

In determining congressional intent, the court focused not on the language of the preemption provision, but on language contained in the FCLAA's preamble and in its legislative history. Based on those sources, the court determined: (1) Congress intended to preserve local power to regulate in areas of traditional local concern -- in particular, the power to regulate "sales to minors, taxation, indoor smoking, or 'similar police regulations,'" (*id.* at 18a (quoting S. Rep. No. 566, 91st Cong., 2d Sess. (1969)); and (2) Congress intended to preempt local regulatory power in such areas only to the extent that it interfered with a federal interests in "control[ling] cigarette advertising information" and in "avoiding 'diverse, nonuniform, and confusing'

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[3] While the appeals court by and large refused to focus its attention on the language of the preemption provision, it focused briefly on that language in connection with its analysis of the Ordinance's "tombstone" provision. The court rejected as "sophistry" Respondents' argument that the Ordinance was not "based on smoking and health" within the meaning of 15 U.S.C. § 1334(b). The court held that the Ordinance was "based on smoking and health" both because its legislative history "is replete with references to the twin purposes of promoting health and combating the dangers of smoking," and because the *effect* of another of the Ordinance's purposes (to assist in enforcement of the ban on sales to minors) is to promote health. *Id.* at 15a.

advertising standards." *Id.* at 11a (quoting 15 U.S.C. § 1331). Because the court determined that regulation of sign location "lies within the heartland of the states' historic police powers," and that the Ordinance did not interfere with the federal interest in uniformity, the Ordinance was not preempted. *Id.* at 16a-18a.

The appeals court justified its refusal to focus on the language of the FCLAA's preemption provision by invoking the "presumption against pre-emption" of State and local law by federal law. *Id.* at 7a-9a. The court said that giving full effect to the broadly worded language of the FCLAA's preemption provision would be improper because the effect would be to "subvert the presumption against pre-emption." *Id.*

The appeals court reversed the district court's preemption finding (with the exception described in Note 2 above) and remanded the case to the district court for consideration of Greater New York's constitutional challenges to the Ordinance. *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve the Conflict Among the Circuits Regarding the Scope of Federal Preemption Under the FCLAA

One month after the Second Circuit issued its ruling, the Ninth Circuit held that a Tacoma, Washington ordinance -- identical in all relevant respects to the New York City Ordinance -- was preempted by the FCLAA. *Lindsey v. Tacoma-Pierce County Health Department,* 195 F.3d 1065 (9th Cir. 1999). Pet. App. 75a-93a. The Court should

grant review in this case in order to resolve the irreconcilable conflict between these decisions, on an issue of significant national importance.

There can be no serious argument that *Lindsey* is not in direct conflict with the decision below. Indeed, the Ninth Circuit went out of its way to reject the Second Circuit's holding and to criticize its rationale, as well as decisions of the Fourth and Seventh Circuits that upheld similar ordinances restricting tobacco advertising.[4] *Lindsey* stated that the Second Circuit's rationale "not only [is] unsupportable by reference to the text, but the Congressional purpose of [the FCLAA's preemption provision] supports the preemption of a ban on outdoor tobacco advertising." *Lindsey*, Pet. App. 87a. The Tacoma Ordinance and the New York City Ordinance cannot meaningfully be distinguished from one another; in each instance the local government banned outdoor tobacco advertising in vast sections of the city without imposing similar restrictions on other types of advertising. Yet, the Ninth and Second Circuits reached diametrically opposed conclusions regarding the effect of the FCLAA on those ordinances. Review by this Court is warranted to resolve the conflict created by these decisions.

On January 18, 2000, the parties in *Lindsey* filed briefs on the issue of whether the Ninth Circuit ought to grant

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[4] *Penn Advertising, Inc. v. Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999), *cert. filed*, No. 99-1172 (Jan. 12, 2000).

rehearing *en banc*. The Ninth Circuit has not provided any indication, however, that it is seriously entertaining the thought of granting rehearing, let alone that it is seriously considering reversing the panel decision. In the absence of substantial evidence suggesting that the Ninth Circuit will on its own eliminate the circuit conflict by reversing the panel decision, there is no reason for this Court to delay its resolution of the conflict.

Moreover, the issue takes on added urgency because of the large number of local jurisdictions that have adopted bans on outdoor cigarette advertising in the years following the Fourth Circuit's 1996 *Penn Advertising* decision upholding Baltimore's ban. Such ordinances have spawned large numbers of lawsuits, many of them filed outside the four circuits (the Second, Fourth, Seventh, and Ninth) that have already ruled on the issue. *See, e.g., Missouri Retailers Assoc. v. City of St. Louis*, No. 4:98CV1514 (E.D.Mo. 1999) (striking down St. Louis ban on outdoor tobacco advertising on First Amendment grounds); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998) (holding that ban on outdoor tobacco advertising is preempted by FCLAA); *Chiglo v. City of Preston*, 909 F. Supp. 675 (D.Minn. 1995) (same); *Lorillard v. Reilly*, No. 99-11118-WGY (D.Mass. Jan. 24, 2000) (upholding Massachusetts ban on outdoor tobacco advertising in face of FCLAA and First Amendment challenges).

There is every reason to believe that litigation raising FCLAA challenges to such advertising bans will continue. Indeed, the First Circuit has granted expedited review of the district court's FCLAA decision in *Lorillard* and has enjoined enforcement of the Massachusetts ban pending appeal.

Moreover, there is no basis for viewing the Ninth Circuit's FCLAA decision as an aberration that is unlikely to be replicated. At least four federal district courts have concluded that outdoor tobacco advertising bans substantially similar or identical to New York City's are preempted by the FCLAA. Two (*Rockwood* and *Chiglo*) are cited above. The other two are the district court decisions in this case and in *Federation of Advertising Industry Representatives, Inc. v. City of Chicago,* 12 F. Supp. 2d 844 (N.D. Ill. 1998), *rev'd and remanded*, 189 F.3d 633 (7th Cir. 1999). Accordingly, as challenges to outdoor tobacco advertising bans continue to make their way through the courts, there is every reason to believe that other federal appeals courts will join the Ninth Circuit in determining that such bans at the state and local level are preempted by the FCLAA.

There is no sound reason for this Court to delay consideration of the FCLAA issue until after additional appeals courts have weighed in on the issue. In view of the existing disarray among the lower federal courts on the issue, State and local governments considering adopting such bans are in desperate need of guidance from the Court. Advertisers and tobacco companies are also in need of guidance regarding their rights to provide truthful information to the public without interference from State and local governments.

II. The Second Circuit's Decision Is Contrary to the Plain Text of the FCLAA and This Court's Decision in *Cipollone*

The Court should grant the petition for the additional reason that the Second Circuit's decision is contrary to the

plain text of the FCLAA and this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

The FCLAA's preemption provision states in relevant part:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b).

At least six Justices in *Cipollone* recognized that the language of § 1334(b) is expansive. Even after giving the language of § 1334(b) a "narrow" reading (*Cipollone*, 505 U.S. at 518), the *Cipollone* plurality emphasized that the FCLAA's ban on *any* "requirement or prohibition" "sweeps broadly." *Id.* at 521. *See also id.* at 535 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part).

The Second Circuit did not appear to disagree with that conclusion. Pet. App. 8a (the FCLAA's preemption provision contains "open-ended language" which, if read "literally," would apply very broadly to State regulation of cigarette advertising and promotion). Yet, outside its analysis of the "tombstone" provision, the court made no effort to apply § 1334(b)'s expansive preemption language to the facts of this case.[5] Indeed, the Court rejected *any*

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[5] The court did not, for example, consider whether the Ordinance is "with respect to the advertising or promotion of any cigarettes." 15 (continued...)

reliance on § 1334(b)'s language on the ground that such reliance would be an inappropriate "hyper-literal approach" that "could subvert the presumption against preemption." Pet. App. 8a-9a. Instead, the court based its holding that § 1334(b) did not preempt the Ordinance on its conclusion that the Ordinance did not interfere with what the court viewed as § 1334(b)'s essential purposes -- to "control cigarette advertising information" and to prevent commerce from being impeded by diverse, nonuniform, and confusing cigarette advertising regulations. *Id.* at 16a-17a.

That atextual approach to federal preemption analysis is directly contrary to the approach mandated by *Cipollone* and other preemption decisions of this Court. As the Second Circuit recognized, this Court has held that "[t]he purpose of Congress is the ultimate touchstone of every pre-emption case." *Id.* at 7a (quoting *Medtronic v. Lohr,* 518 U.S. 470, 485 (1996)). The actual statutory language employed by Congress is, of course, the primary basis upon which congressional intent is to be determined. *Hughes Aircraft Co. v. Jacobson,* 119 S. Ct. 755, 760 (1999). Accordingly, the Second Circuit's analysis -- by eschewing any examination of § 1334(b)'s language -- was flawed from the outset.

After closely examining the language of § 1334(b), the Court in *Cipollone* determined that some common-law tort claims against cigarette manufacturers are preempted by the FCLAA but that others are not. The Court determined that failure-to-warn claims are preempted to the extent that they allege a duty to include health warnings in advertising,

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[5](...continued)
U.S.C. § 1334(b).

because such claims amount to requirements "based on smoking and health." *Cipollone*, 505 U.S. at 524 (plurality opinion). Conversely, the Court determined that fraudulent misrepresentation claims are to a large extent *not* preempted because "[s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation -- the duty not to deceive." *Id.* at 528 (plurality opinion). In sum, *Cipollone* made clear that the determination of whether a particular State or local "requirement or prohibition" is preempted by § 1334(b) can only be made after examining whether the requirement/prohibition is covered by the statute's preemption language. By failing to undertake that examination, the Second Circuit has deviated from *Cipollone's* mandate.

Moreover, the Second Circuit decision is insupportable even when considered on its own terms. Citing language in the FCLAA's preamble, the court concluded that Congress intended to preempt local authority in areas traditionally regulated at the local level[6] only to the extent that the local regulation interfered with a federal interest in uniformity of tobacco labeling and advertising regulations. The Second

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[6] The court's conclusion that tobacco advertising has traditionally been subject to regulation at the local level is not supported by the record. Respondents do not contend that they have ever previously attempted to impose special restrictions on tobacco advertising, or to impose restrictions on *any* outdoor advertising based on the subject matter of the advertisement. Indeed, local restrictions on tobacco advertising were not attempted outside Utah until very recently. As this Court held last week, the presumption against federal preemption of State and local law is not triggered when the State or local law addresses a matter that (as here) traditionally has been regulated at the national level rather than the State or local level. *United States v. Locke*, 68 U.S.L.W. 4184, 4189 (U.S. Mar. 6, 2000).

Circuit determined that the Ordinance was not preempted because it did not interfere with the federal interest in uniformity. Pet. App. 16a-17a.[7]

But the Ordinance quite clearly *does* interfere with the federal interest in uniformity of advertising regulations. As a result of the Second Circuit's decision, advertisers will face a maze of additional, nonuniform regulations. In some locations tobacco advertisers need only concern themselves with traditional zoning regulations, while in other locations they will also have to contend with additional, nonuniform restrictions applicable only to tobacco advertising. Simply because tobacco advertisers are already subject to some degree of regulation at the local level is not reason to ignore Congress's mandate and to permit an unlimited degree of nonuniform, local regulation.

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[7] The portion of the FCLAA preamble cited and relied on by the Second Circuit reads as follows:

> It is the policy of the Congress and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby --
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

The court also suggested that § 1334(b) is intended to bar State and local governments from "control[ling] cigarette advertising information" by mandating the specific content of tobacco advertising, but not to bar them from prohibiting tobacco advertising in specified locations. *Id.* at 15a-16a. But that interpretation ignores the plain language of § 1334(b); the statute bars any "requirement *or prohibition*" (emphasis added) imposed for the purposes described in § 1334(b). There is no avoiding the conclusion that a law prohibiting cigarette advertising (but not other types of advertising) at certain locations is a "prohibition" within the meaning of the statute. The Second Circuit's interpretation of the FCLAA, by limiting preemption to those ordinances that create nonuniformity by specifying the content of advertisements, simply writes the word "prohibition" out of the statute.

In sum, review of the decision below is warranted for the additional reason that it is plainly contrary to this Court's decision in *Cipollone* and the text of the FCLAA.

III. The Court Should Grant Review in Order to Provide Guidance Regarding the Extent of the Presumption Against Preemption

In recent preemption cases, the Court invariably has begun its analysis by reciting two precepts that guide its analysis. First, the Court states that preemption ultimately must be based on the intent of Congress; if Congress has expressed its intent to preempt local law, then the issue is resolved in favor of preemption by virtue of operation of the Supremacy Clause. *See, e.g., Medtronic,* 518 U.S. at 486-87; *Cipollone,* 505 U.S. at 516; *English v. General Electric Co.,* 496 U.S. 72, 78-79 (1990).

Second, the Court states that there is a presumption that Congress does not intend its preemption statutes to supersede State law in fields that the States have traditionally occupied, unless Congress has made very clear its intent to do so. *See, e.g., Medtronic,* 518 U.S. at 485.

The Court has not directly confronted the inherent contradiction in those two pronouncements on preemption. If the purpose of Congress is truly the "touchstone" of preemption analysis, then a presumption against preemption can only lead the Court away from the touchstone, substituting instead a bias in favor of preserving state law regardless of congressional intent.

Moreover, the Court has not consistently applied the presumption against preemption. Indeed, in numerous preemption cases over the past two decades, the presumption (whose origin is somewhat obscure) is not mentioned at all. *See, e.g., Freightliner Corp. v. Myrick,* 514 U.S. 280 (1995); *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992); *Norfolk & Western R. Co. v. American Train Dispatchers Ass'n,* 499 U.S. 117 (1991). In *Cipollone,* the Court suggested that the existence of an express preemption statute precluded the possibility of implied federal preemption. *Cipollone,* 505 U.S. at 517. Just three years later, the Court disavowed that suggestion. *Myrick,* 514 U.S. at 288-89.

The inherent tension within the Court's preemption case law has led to considerable confusion among the lower federal courts. That confusion is well illustrated by the decision below. The Second Circuit acknowledged that the plain language of the FCLAA dictated a conclusion that the FCLAA preempted the Ordinance. The court nonetheless

felt itself bound by this Court's presumption against preemption to ignore standard rules of statutory construction in order to uphold the Ordinance. Pet. App. 8a-9a.

The Court should grant review in this case in order to dispel the confusion engendered by the Court's recent preemption case law. The Court should spell out once and for all whether standard rules of statutory construction apply to preemption cases, or whether the presumption against preemption is so strong as to permit courts to disregard federal statutory language in order to avoid interference with the traditional police powers of State and local governments.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 99-1171

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., THE ADVERTISING FREEDOM COALITION, and THE ADVERTISING CLUB OF NEW YORK, INC.,

Petitioners,

—v.—

RUDOLPH W. GIULIANI, in his official capacity as Mayor of the City of New York, THE CITY OF NEW YORK, GASTON SILVA, in his official capacity as Commissioner of the New York City Department of Buildings, and ALFRED C. CERULLO III, in his official capacity as Commissioner of the New York City Department of Finance,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

The City of New York and its officials (collectively, "the City") argue that review should be denied because: (1) Petitioners' claim regarding a circuit split is premature; (2) the decision below is interlocutory; and (3) the decision below is correct. The City's arguments should be rejected and certiorari should be granted.

1. The City does not and cannot dispute that the Second Circuit's opinion in this case (as well as the Fourth Circuit's opinion in *Penn Advertising, Inc.* v. *Mayor and City Council*[1] and the Seventh Circuit's opinion in *Federation of Advertising Industry Representatives, Inc.* v. *City of Chicago*[2]) directly conflicts with the Ninth Circuit's decision in *Lindsey* v. *Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999), *amended by*, __ F.3d __, 2000 WL 149423 (9th Cir. Feb. 14, 2000). Nor does the City deny that the very fact of the resulting circuit split concerning the scope of federal preemption under the Federal Cigarette Labeling and Advertising Act ("FCLAA") undermines the policy of FCLAA of preventing "diverse, nonuniform, and confusing" cigarette "advertising regulations." 15 U.S.C. § 1331(2) (1994). Rather, the City argues that Petitioners' claim of conflict is premature in light of the Ninth Circuit's request for briefing on whether *Lindsey* should be reheard *en banc*. (Respondents' Brief in Opposition ("Resp. Opp. Br.") at 14) This point is now moot.

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[1] 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

[2] 189 F.3d 633 (7th Cir. 1999), *petition for certiorari filed*, 68 U.S.L.W. 3480 (U.S. Jan. 12, 2000) (No. 99-1172).

Three days after the City filed its Brief in Opposition, the Ninth Circuit ordered the issuance of the mandate in *Lindsey*. *See* Order for Mandate to Issue, Mar. 13, 2000, attached hereto as App. 1a-2a; Ninth Circuit General Order 5.5(c) ("If the [*en banc*] call fails to obtain a majority, the panel shall resume control of the case and no further *en banc* action is required"); *see also* Order for Reversal of District Court Judgment, Mar. 17, 2000, attached hereto as App. 3a-4a. The decision in *Lindsey* is therefore final. It is the law in the nine states within the Ninth Circuit and is in direct conflict with the law in the eleven states within the Second, Fourth and Seventh Circuits. A conflict of this magnitude on an issue of this significance is well worthy of this Court's review.[3]

2. The City's argument that this case is inappropriate for plenary review because the decision below is "interlocutory" (Resp. Opp. Br. at 14) is equally misconceived. The Second Circuit has said its piece on preemption. Regardless of the further course of proceedings in this

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[3] The City ventures that a 3-1 split shows too much agreement among the circuits to support review by this Court. Resp. Opp. Br. at 13. This Court's precedents suggest otherwise. *See, e.g.*, *Weisgram v. Marley Co.*, 120 S. Ct. 1011, 1016 n.2 (2000) (review granted to resolve 4-1 circuit split); *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (review granted to resolve 10-1 split). Urging rehearing in *Lindsey*, the United States emphasized that the circuit split here is one involving "an important federal statutory scheme in the context of an issue of substantial public concern," Brief of the United States as *Amicus Curiae* Regarding Rehearing *En Banc* at 16, while 19 *amici* States declared that the circuit split raises "questions of federalism and the scope of state and local government police powers that are of fundamental importance to the *amici* States." Brief of *Amicus Curiae* States Regarding Rehearing at 1. That—and the fact that the Second and Seventh Circuits disregarded this Court's controlling decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)—is precisely why *certiorari* in this case and *Federation of Advertising Industry Representatives, Inc.*, No. 99-1172, is warranted.

case, its preemption decision will remain in conflict with the Ninth Circuit's preemption decision in *Lindsey*. The conflict cannot be eliminated or resolved, except by this Court. Moreover, only by granting review in this case and *Federation of Advertising Industry Representatives, Inc.* (No. 99-1172) can this Court resolve the conflict between the Ninth Circuit's decision in *Lindsey*, as to which review will not be sought,[4] and the Fourth Circuit's decision in *Penn Advertising*, as to which review has been denied.[5]

In any event, to allow the boundaries of the preemptive scope of the FCLAA to remain unsettled for a period of what may well be years—in the face of continuing circuit conflict—while other issues are tried and appealed would only delay resolution of a significant legal issue that should best be resolved now. *See* Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, SUPREME COURT PRACTICE 197 (7th ed. 1993) (even though other issues remained to be decided below, the Court has granted *certiorari* where there was a conflict on a question of law with another court of appeals which would justify review of a final decree or judgment); *Geissal v. Moore Medical Corp.*, 524 U.S. 74, 79 (1998); *United States v. General Motors Corp.*, 323 U.S. 373, 374-377 (1945); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-09 (1916); *Forsyth v. City of Hammond*, 166 U.S. 506, 514 (1897); *see also* SUPREME COURT PRACTICE at 197 (*certiorari* granted where nonfinal judgment presented "a novel and important question of law and where petitioner's position, if sustained, would render the decision wholly void"). The need to resolve the conflict among the circuits on this important question of federal law is both immediate and urgent.

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[4] *See* Petition for *Certiorari* at 9 n.3.

[5] *See* p. 1, n.1, *supra*.

Moreover, a large number of local jurisdictions have adopted ordinances banning or restricting outdoor cigarette advertising in the past several years. These measures have spawned a large amount of litigation.[6] This multiplicity of local regulations and conflicting court decisions determining their validity or invalidity is precisely the "diverse, confusing, and nonuniform" result that Congress sought to avoid in passing the FCLAA. *See* 15 U.S.C. § 1331(2). States and local governments adopting such regulations and the advertisers of cigarettes affected by them are in need of guidance from the Court.

3. The City is unable to support the Second Circuit's refusal to "'give effect to [the] plain language'" of FCLAA § 1334(b) in this case. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (citation omitted). This Court, stating that Section 1334(b) "provides a 'reliable indicium of congressional intent with respect to state authority,'" *id.* at 517 (citation omitted), stressed that the task in determining the scope of FCLAA preemption is to construe "the precise language" of Section 1334(b). *Id.* at 523. The Court described this task as "straightforward," *id.* at 524, concluding that there is "no 'good reason to believe' that Congress meant less than what it said" in the plain language of Section 1334(b), *id.* at 522 (citation omitted), and that "the pre-emptive scope of [the FCLAA] is governed

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[6] In addition to *Penn Advertising*, *Federation of Advertising Industry Representatives*, *Lindsey*, and this case, there have been numerous district court cases that have ruled on the application of FCLAA preemption to local laws regulating cigarette advertising. *See, e.g.*, *Rockwood* v. *City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998) (holding that ordinance regulating outdoor cigarette advertising is preempted by FCLAA); *Chiglo* v. *City of Preston*, 909 F. Supp. 675 (D. Minn. 1995) (same); *Lorillard Tobacco Co.* v. *Reilly*, 76 F. Supp. 2d 124 (D. Mass. 1999) (rejecting FCLAA preemption challenge to law regulating outdoor cigarette advertising), *appeal pending*, No. 00-1117 (1st Cir. 2000).

entirely by the express language in [Section 1334(b)]. . . ." *Cipollone*, 505 U.S. at 517; *see also id.* at 521 n.19 (where legislative history suggests an interpretation of FCLAA contrary to plain meaning, that interpretation must be rejected).[7] The Second Circuit, like the Seventh Circuit in *Federation Advertising Industry Representatives*, essentially treated *Cipollone* as having been superseded by subsequent decisions of this Court involving other statutes. *See* Petition for *Certiorari* at 15 n.7; Appendix to Petition for *Certiorari* at 7a-8a, 66a-69a. Nothing in the City's brief justifies such a deviation from *Cipollone* and, of course, any such deviation can only be authorized by this Court itself.[8]

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[7] The Second Circuit's holding not only distorts the plain language of Section 1334(b), but misstates the legislative history to reach a result that Congress never intended. For instance, there is no merit to the court of appeals' conclusion that this Court's citation to the Senate Report to the FCLAA in *Cipollone* justifies the holding of no preemption in this case. While the Senate Report makes clear that preemption does not apply to state laws concerning "the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public places, or *similar* police regulations," S. Rep. No. 91-566, 91st Cong., 1st Sess. 12 (1969) (emphasis added)), advertising regulations are not "similar" to cigarette taxes, minimum-age laws, or smoking restrictions. They are precisely and inescapably what Section 1334(b) singles out as preempted by federal law.

[8] A concurring opinion in *Lindsey* by Judge O'Scannlain, issued after the filing of the petition in this case, relating to later precedent of this Court is annexed hereto as App. 5a-7a. *See also Agostini v. Felton*, 521 U.S. 203, 237 (1997) (rejecting the proposition "that other courts should conclude that our more recent cases have, by implication, overruled an earlier precedent").

CONCLUSION

For the reasons stated above and for those set forth in our petition, it is respectfully submitted that the petition for a writ of *certiorari* should be granted.

Dated: New York, New York
March 20, 2000

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35416
Filed March 13, 2000

JAMES R. LINDSEY; SUN CHA LINDSEY, and and their marital community,

Plaintiffs-Appellants,

MBA, INC., a Washington corporation; F I T S, LLC, a Washington limited liability corporation; SAN JUNG CORPORATION, a Washington corporation,

Plaintiffs,

—VS.—

TACOMA PIERCE COUNTY HEALTH DEPARTMENT, a combined City-County Health Department; its Board of Health; TACOMA PIERCE COUNTY BOARD OF HEALTH; FREDICO CRUZ-URIBE, Director of Health for the Tacoma-Pierce County Health Department in his official capacity; BRIAN EBERSOLE, in his official capacity; FRANCEA MCNAIR, in her official capacity; WENDELL BROWN, in his official capacity; KAREN BISKEY, in her official capacity; LEONARD E. SANDERSON, in his official capacity; DAVID SPARLING, in his official capacity; ROBERT W. EVANS, in his official capacity,

Defendants-Appellees,

—and—

COUNTY OF PIERCE; CITY OF TACOMA, a municipal corporation,

Defendants.

Before:

CANBY, BRUNETTI, and O'SCANNLAIN,
Circuit Judges.

ORDER

The mandate shall issue forthwith.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35416
CT/AG#: CV-97-05070-RJB
Filed March 17, 2000

JAMES R. LINDSEY; SUN CHA LINDSEY,
and their marital community,

Plaintiffs-Appellants,

MBA, INC., a Washington corporation; F I T S, LLC, a Washington limited liability corporation; SAN JUNG CORPORATION, a Washington corporation,

Plaintiffs,

—v.—

TACOMA PIERCE COUNTY HEALTH DEPARTMENT, a combined City-County Health Department; its Board of Health; TACOMA PIERCE COUNTY BOARD OF HEALTH; FREDICO CRUZ-URIBE, Director of Health for the Tacoma-Pierce County Health Department in his official capacity; BRIAN EBERSOLE, in his official capacity; FRANCEA MCNAIR, in her official capacity; WENDELL BROWN, in his official capacity; KAREN BISKEY, in her official capacity; LEONARD E. SANDERSON, in his official capacity; DAVID SPARLING, in his official capacity; ROBERT W. EVANS, in his official capacity,

Defendants-Appellees,

—and—

COUNTY OF PIERCE; CITY OF TACOMA,
a municipal corporation,

Defendants.

APPEAL FROM the United States District Court for the Western District of Washington (Tacoma).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Tacoma) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED.

Filed and entered NOVEMBER 19, 1999.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35416
Filed February 14, 2000

JAMES R. LINDSEY; SUN CHA LINDSEY, and their marital community,

Plaintiffs-Appellants,

MBA, INC., a Washington corporation; F I T S, LLC, a Washington limited liability corporation; SAN JUNG CORPORATION, a Washington corporation,

Plaintiffs,

—v.—

TACOMA-PIERCE COUNTY HEALTH DEPARTMENT, a combined City-County Health Department; its Board of Health; TACOMA-PIERCE COUNTY BOARD OF HEALTH; FEDERICO CRUZ-URIBE, Director of Health for the Tacoma-Pierce County Health Department in his official capacity; BRIAN EBERSOLE, in his official capacity; FRANCEA MCNAIR, in her official capacity; WENDELL BROWN, in his official capacity; KAREN BISKEY, in her official capacity; LEONARD E. SANDERSON, in his official capacity; DAVID SPARLING, in his official capacity; ROBERT W. EVANS, in his official capacity,

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—and—

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Before:

CANBY, BRUNETTI, and O'SCANNLAIN,
Circuit Judges.

ORDER; Concurrence by Judge O'Scannlain

ORDER

The opinion filed on November 19, 1999 and published at 195 F.3d 1065 is amended to include Judge O'Scannlain's specially concurring opinion attached hereto.

O'SCANNLAIN, *Circuit Judge*, specially concurring:

I concur in the thorough and well-reasoned opinion of the court, which faithfully applies Supreme Court precedent governing FCLAA preemption, as set forth in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). I write separately only to note that in recent decisions outside of the FCLAA context, the Court appears to be moving toward an approach to preemption issues that is more pragmatic (rather than strictly textual) and more deferential towards state law. *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) (analyzing ERISA preemption).

The Court has made clear, however, that "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 109 S.Ct. 1917,

104 L.Ed.2d 526 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (rejecting the proposition "that other courts should ever conclude that [the Supreme Court's] recent cases have, by implication, overruled an earlier precedent"). Thus we must follow *Cipollone*, rather than collateral intervening cases addressing preemption in different areas of the law. With this observation, I join wholeheartedly in the opinion of the court.